Supreme Court, U.S.
FILED

OCT 21 2009

OFFICE OF THE CLERK

No. 09-71

IN THE

Supreme Court of the United States

JOAN E. JACKSON,

Petitioner,

v.

*THE HONORABLE JOHN MCHUGH,
SECRETARY OF THE ARMY,
[THE HONORABLE PETER GEREN,
SECRETARY OF THE ARMY,]

Respondent,

v.

BRIANNA SKINNER-HARRIS,

Movant.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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* Sept. 21, 2009 Appointment.

QUESTIONS PRESENTED

I. To avoid financial liability for undisclosed public health risk to deployed citizens, may the respondent's actions, to permanently preclude a government scientist's infectious diseases pathology research disclosure in peer-reviewed science journals and before medical research professional societies, be upheld under the First Amendment?

II. To avoid a research grant agreement financial obligation predicated on the research author-inventor's grant affiliation, may the respondent exercise copyright-like ownership against the plain meaning of 17 U.S.C. § 105 to administratively reassign research authorship to a non-author not grant affiliated; and, thereby, to create fictitious research records in support of replacement of the actual inventor with "administratively assigned inventor," who cannot in fact meet 35 U.S.C. § 102(a),(f) requirements to be named inventor; i.e. executive agency actions, if upheld as valid, may redefine in practice statutory inventor from "inventor first to conceive" to "inventor by executive reassignment"?

III. May the respondent, to achieve objectives of I and II, take actions adverse to petitioner against the teaching of *Burlington Northern v. White*, 548 U.S. 53, 67-68 (2006) holding the anti-retaliation provision protects an individual from retaliation that produces injury/harm sufficient to dissuade a reasonable person in the petitioner's position from making or supporting a charge of discrimination?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1, the list identifies all of the parties appearing here and in the court below.

The Petitioner is Joan Elise Jackson, a United States citizen, and former "tenured" federal government civil service employee [GS14/08], PhD Senior Research Scientist/Laboratory Director/ Program Manager, employed more than 25 years by the Walter Reed Army Institute of Research, hereinafter "WRAIR," Silver Spring, Maryland.

The Respondents are The Honorable Secretary of the Army, John McHugh [as of Sept. 21, 2009], prior, The Honorable Peter Geren, Secretary of the Army; and Brianna Skinner-Harris, Movant, a military officer formerly assigned to Walter Reed Army Institute of Research, Silver Spring, Maryland.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations. However, as noted in corporate disclosure in the court below, respondent's avoided research grant agreement [*see*, Appendix B] regarding intellectual property on which petitioner and others are named, may reach certain third party inventors and a trust established for science and medical infrastructure support in West and Central Africa.

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Petitioner Joan Elise Jackson respectfully petitions for a writ of certiorari for the judgment of the United States Court of Appeals for the Fourth Circuit for the District of Maryland in this case.

OPINION BELOW

The Fourth Circuit denial of rehearing *en banc* was [998130117-21] filed on July 21, 2009. The court of appeals (App. 09-1081) opinion is unpublished and reported at 325 Fed. Appx. 213, 2009 WL 1324666 (4th Cir. (Md.)) filed May 13, 2009. The opinions of the district court (No. 8:07-cv-00851-AW) are unpublished (Dist. Ct. Dkt. 61) entered on November 14, 2008 and (Dist. Ct. Dkt. 13) entered March 26, 2008. Order on motions was issued May 20, 2008. Dist. Ct. Dkt. 24. Pt. Appendix A.

Notice of intent to file writ for certiorari with certificate of service of notice was mailed to the Court of Appeals and mailed to the named parties overnight delivery signature required on July 30, 2009.

Petitioner submitted a petition for writ of certiorari mailed on 19 October 2009. The Clerk of the Court on October 27, 2009, returned the petition with instructions to resubmit this petition in correct format within 60 days.

JURISDICTION

The Court of Appeals for the Fourth Circuit, having jurisdiction by 28 U.S.C. § 1291, denied *en banc* rehearing, affirming without opinion, on July 21, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1); by the U.S. Constitution, art. III, § 2, cl. 1-2.

CONSTITUTIONAL, STATUTORY, AND INTERNATIONAL LAW PROVISIONS

The relevant constitutional and statutory law provisions are set forth in the Appendix C.

REASONS FOR GRANTING THE PETITION

This case presents three important factual questions having no clear consensus in among the Federal Circuits which if resolved would have significant impact on public health policy, and clarification of limits of executive agency action under the First Amendment and under Title VII, of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* The balance, between safeguarding the public's right to receive critical information and the protection of those government employees who engage in disclosure of such information versus governmental interest in nondisclosure, currently divides the Circuits based on where this balance is deemed met.

The Sixth, Seventh and Ninth Circuits seem in general to adopt a broad approach to both employee free speech and Title VII retaliation actions

where the government act is weighed for "likely to chill exercise of belief and association by the public employee."[1] The Fifth, Eighth, and Eleventh Circuits, while agreeing that First Amendment and Title VII claims extend beyond ultimate employment actions such as e.g. hiring, termination, demotion, reprimand, differ by limiting adverse action to that materially effecting conditions or terms of employment, that is a "material disadvantage" standard.[2]

The concern is that the latter narrow standard would sanction most government employer retaliation short of ultimate acts, restricting in fact the public's right to receive critical information about their government from public employees who have cause to know it and are dissuaded from disclosing such information. Application of the narrow protection standard may be viewed as an unbalance against the public's benefit by substantially inhibiting vigorous public debate of controversial government policy. Instead of debate to improve executive function, such restricted protection weighs to favor benefit to *immediate* and often short-term executive agency objectives or policy even when such executive prohibition against controversial information is contrary to public welfare.

First Amendment and Title VII retaliation protections are inextricably intertwined for federal employees simply because the mechanism for agen-

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[1] *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 73 (1990).

[2] *Jones v. Fitzgerald*, 285 F.3d 705, 713 (8th Cir. 2002).

cy disclosure control inevitably runs to employment actions.

STATEMENT

The Court Of Appeals' Decision Fully Resolved Several Issues, Each Of Which Is Appropriate For Certiorari, And Its Resolution Is Inconsistent With The Decisions Of This Court And Other Circuits.

i. **The Court of Appeals, affirming the district court, erroneously decided that respondent's actions were made in good faith instead of medical liability and research contractual avoidance.**

ii. **The Court of Appeals erroneous failure to view a loss of almost half a scientist's research career achievement taken with publication (republication 2007) of unsubstantiated felony allegations and of baseless defamation of mental function for professional ability as absence of material harm.**

Petitioner was employed at Walter Reed Army Institute of Research for 27 years, first as a Visiting Scientist, then for >23 years as senior civilian government service PhD research scientist, Laboratory Director/Program Manger [GS14/08].

During every year of government service for which a job rating was done, about 25 annual ratings, petitioner's job performance was rated topmost achievable. Dist. Ct. Dkt. 11, at page 11.

During her entire professional career from 1970 until 2006, about 35 years, petitioner's research focused on the tropical disease complex, leishmaniases, infecting humans and warm-blooded animals, and having in several infection forms, disease analogies to HIV-AIDS. Exhibit 3, Dist. Ct. Dkt. 11. *See also*, Appendix D. Petitioner's primary research mandate was the discovery of new, more effective and less toxic alternatives to the >60-year-old-intravenous drug therapies used to treat leishmanial infections of humans. Petitioner is lead inventor or co-inventor on 20 patents/patent applications, most of which are new drugs or drug screening inventions applicable to leishmaniases, other tropical infectious diseases, and fungi. Exhibit 5, Dist. Ct. Dkt. 11.

Petitioner has published numerous articles, book chapters and given invited papers on her research overseas in Brazil, Italy, Austria, Nigeria, and Cameroon for various international organizations including the International Atomic Energy Agency, the World Health Organization and Pan American Health Organization. Petitioner also reviewed grants of other investigators for science merit at the request of the National Institutes of Health and the Science Commission for the European Union Communities. Petitioner was Deputy Director of Walter Reed Army Institute of Research's Tropical Medicine Course for U.S. Army physicians; and adjunct graduate faculty at the Uniformed Services University of the Health Sciences, F. Edward Herbert Medical School, Bethesda, Maryland, teaching clinical parasitology for about 15 years. Exhibits 3-4, Dist. Ct. Dkt. 11.

Petitioner also served as manuscript peer-reviewer for American Journal of Tropical Medicine and Hygiene; on science research committees of the American Society of Parasitology; and as Executive Committee Member-, Corresponding Secretary-Treasurer- (managing all the Society's business accounts and filing the tax returns) and President-elect of the Helminthological Society of Washington. Petitioner served as adjunct graduate-advisor for Masters and PhD candidates (four of whom were PhD candidates at the University of Calcutta, Calcutta, India) and as laboratory sponsor of many high school science student summer interns. *Id.* Petitioner routinely supervised between one to four civilian technical and professional staff.

In her entire > 35 year professional career no person, ever filed a complaint or grievance against her or implied petitioner was dishonest or mentally impaired outside her two Title VII actions.

For the reasons herein given and against her wishes, petitioner is presently not employed as a senior research scientist being early retired on 30 September 2006.

I. **To avoid financial liability for undisclosed public health risk to deployed citizens, may the respondent's actions to permanently preclude a government scientist's infectious diseases pathology research disclosure in peer-reviewed science journals and before professional medical research scientific societies be upheld under the First Amendment as constitutional?**

A. *How is retaliation recognized?*

While public employees historically were considered to have relinquished First Amendment protection in exchange for government employment, the modern trend is that although there may be some restraints, freedom of speech and association are generally held protected.[3] Protections recognized have included employee disclosures "to any person" of abuse of authority, and danger to public health and safety. In particular, disclosures of good faith dangers or risks to the public are generally protected, in many cases irrespective of balancing an employee's interest in First Amendment protections against accommodation of the needs of government.[4]

In *Bailey v. Kirk* claims of harassment of police chief by suspensions and demotion survived summary judgment, despite absence of property or

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[3] *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731 (1968).

[4] *See generally*, Isadore Silver, Public Employee Discharge and Discipline 1011-1090 (Aspen Publishers, Inc. 2005).

liberty interest and fairness of hearing reviewing various disciplinary sections. 777 F.2d 567 (10th Cir. 1985). Demotion, reduction in salary and responsibilities, and repeated queries as to whether an employee would resign were sufficient, since the demotion was a "harbinger of dismissal."[5] Here, petitioner's military supervisor for almost one year repeatedly requested that the petitioner "find something else to do for a job as of September 30, 2002" (or words to that effect).

B. ***Petitioner's dog protocol CO02-00 research permanently denied her disclosure included both pathology and new drug proof of efficacy. The facts and circumstances immediate to animal protocol violation allegations follow.***

Here, like *Mauzy* and *Tennyson*, petitioner was replaced by a younger male military officer who *within 8 days* (October 23, 2002, new supervisor's appointment; petitioner's removal, October 31, 2002) removed her as "unqualified" to remain a

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[5] *Mauzy v. Kelly Servs. Inc.*, 664 N.E.2d 1272, 1281 (Ohio 1996) ("[a] transfer accompanied by measurable compensation at a comparable level does not necessarily preclude a finding of constructive discharge"; evidence of outstanding performance and employer desire for younger employees, adverse employment actions, sham transfer to position eventually unfilled sufficient to withstand summary judgment.). *See also, Tennyson v. School District of Menomonie Area*, 606 N.W.2d 594, 603 (Wis. 1999) (holding where an employer's written policy guarantees its employees they will not be discharged without cause, and employee resigned believing investigation into her claims was neither far nor unbiased, a constructive discharge may be found.)

Laboratory Director which she had been with outstanding (topmost achievable) job performance consistently for 20 years,[6] and had achieved in January 2001 College of American Pathology and Clinical Laboratory Improvement Act of 1988, CAP:CLIA certification "with distinction," *the first laboratory of its kind so certified, for Leishmania Diagnosis, in the U.S.A.*

Thereafter petitioner's new supervisor, LTC Peter Joseph Weina, repeatedly in numerous emails and orally warned that petitioner's laboratory research (now, in his lab not hers) would end within about a year on September 30, 2002, so she should find something else to do. Within 6 months of the "termination date" specified by this new supervisor, LTC Peter Joseph Weina, filed against petitioner a reprimand on April 1, 2002 (alleging patent felony ethics bribery, 18 U.S.C. §§ 208-209),[7] misuse of $60,000 research funds, loss/theft of government equipment valued about >$30,000 for which she would be personally liable (found in LTC Weina's personal locked office), animal protocol violation charges August 29, 2002 (alleging mental impairment, solely on his unlicensed judgment, such that petitioner was a "freakin' liar" and could not distinguish truth from lie and, thus, should no longer be allowed to work as a research scientist,

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[6] Petitioner was a laboratory director of a leishmaniasis research laboratory at Walter Reed from October 1, 1979 to October 31, 20001. She was Laboratory Director of the Leishmania Diagnosis Laboratory furnishing diagnostic support for leishmaniasis detection in humans for Walter Reed Army Hospital from about August 6, 1995 to October 31, 2001.

[7] Exhibit 28, Dist Ct. Dkt. 11.

arguable defamation), notice of proposed suspension September 18, 2002, absent without leave October 2, 2002, notice of suspension October 15, 2002 and October 23, 2002, finally ending in his "taking" petitioner's 32 protocol dogs and >$105,000 science merit awarded research funds for his own distinct research use.

Another military officer, CPT Brianna Skinner, was allegedly "told to place her name" where petitioner's had been as author, on petitioner's dog protocol CO02-00 (>100 single spaced typed pages, approved November 2000 by both Walter Reed and National Institutes of Health) >15 years petitioner's research justifying the protocol.[8] CPT Skinner also testified she was told likewise to delete all leishmaniasis pathology data, *mandated by the approved dog protocol CO02-00*, showing neurologic infection of the outer membrane (dura mater) and blood capillary network (choroid plexus) of the dogs' brains (with associated spontaneous, intermittent behavior change-marked withdrawal, or aggression), adrenal (with lethargy, lack of stamina), sex organs (both sexes), increased predisposition to cancers of many types (infection-associated immunodepression), and transmission of the infection to offspring (miscarriages, stillbirths, neonatal death due to inability to nurse, etc.).[9]

The petitioner's protocol CO02-00 dogs had been infected in nature, and donated by their pri-

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[8] Exhibit 24, Dist. Ct. Dkt. 55.

[9] Exhibit 26, Dist. Ct. Dkt. 55; Appendix E (three pages therefrom).

vate owners for her research, as the canine infection can not be cured by older existing drug therapies and is almost invariably fatal. The dogs came from various states over the U.S.A. so each had to be diagnosed (using the same process as CDC, Walter Reed, and a Reference Lab in Rome. Italy for human diagnosis), i.e. by leishmanial isolation from dog's tissue and the cultured parasites typed for identification. All leishmanial infected CO02-00 dogs were infected with one of the most common strains infecting both humans and dogs in southern Europe, the Mediterranean basin, Middle East, and Asia. The leishmanial parasites from CO02-00 dogs were identified by three laboratories including the U.S. Centers for Diseases Control and Prevention, CDC, Atlanta, Georgia, and the World Health Organization Reference Laboratory, Public Health Service, Rome, Italy. It was highly unusual to have an opportunity to study long-term chronic leishmanial infections in dogs (most lab studies use acute laboratory infected animals). Petitioner was concerned at her pathologic findings because the tissues' damage was not limited to one or two animals but common to a majority of the untreated dogs before she started them on the experimental antileishmanial drug therapy per the CO02-00 protocol.[10]

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[10] Dog protocol CO02-00 is Exhibit 24, Dist. Ct. Dkt. 55.

C. *What is the link of petitioner's dog research to public health risk for deployed?*

The Middle East and Asia are areas the World Health Organization designated as "epidemic" for leishmaniases. See, Appendix D. The military published that from January 2003 to November 2004 "there were 1,178 incident diagnoses of leishmaniasis among members of the U.S. Armed Forces."[11]

For example, in June 1998 a U.S. soldier, Arvid Brown, who had been deployed to Saudi Arabia during the first Gulf War, had his blood sample sent to Walter Reed for diagnosis of suspected leishmaniasis. It was not sent to the *Leishmania* Diagnosis Laboratory, but rather to a serology laboratory distinct from petitioner's lab. The sample tested negative for leishmaniasis. However, testing by a civilian laboratory showed the patient, Mr. Brown, his wife and two children (both born subsequent to his deployment) all tested positive for leishmanial infection.

According to his case, initially filed in 2004, Mr. Brown suffers physical and mental impairments so that he no longer meets the minimum physical and mental standards for the U.S. Army Reserve. His wife died of liver cancer, and his chil-

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[11] Jenny C. Lay, *Leishmaniasis among U.S. Armed Forces, January 2003-November 2004*, Medical Surveillance Monthly Report, 10(6), 2 (2004).

dren both suffer some mental disability.[12] These pathologic manifestations and the sexual transmission between partners and to offspring were the very pathologic manifestations CPT Brianna Skinner was allegedly ordered in 2002-early 2003 to delete from petitioner's dog protocol CO02-00 results, retaining only the new drug testing results showing the experimental drugs worked to cure the first two dogs treated.

Petitioner's July 2002 report in naturally infected dogs recapitulates the Browns' alleged pathologic injuries from leishmaniasis.[13]

Petitioner has been permanently denied publication of any of her dog protocol CO02-00 research executed March 2000-August 2002. *See*, Appendix E. The part of the study done with CDC exactly as the precluded research was published by CDC absent Walter Reed's clearance (albeit Walter Reed after publication granted clearance). This publication on which petitioner was coauthor won two science excellence awards in 2007.[14]

Further, CPT Skinner's senior supervisor, COL Patricia Nossov, was granted clearance by the

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[12] *See, e.g. Brown v. United States*, 451 F.3d 411, 416 (6th Cir. 2006) (holding a post-discharge 1994 examination [for leishmaniases infection] arguably created a new duty to warn). *See also, Brown v. United States*, 583 F.3d 916 6th Cir. 2009). Demand is $125,000,000,000.00. *See* Appendix D.

[13] Appendix E, three pages from Exhibit 26, Dist. Ct. Dkt. 55. Appendix D, 2 pages from Exhibit 10, Dist. Ct. Dkt. 25. *See also*, Appendices F-I.

[14] Exhibit 10, Dist. Ct. Dkt. 60.

Walter Reed attorney in early 2003 to publish petitioner's dog protocol CO02-00 research as COL Nossov's own research.[15] Respondent argued that petitioner's dog protocol was "too corrupt" to publish, when in fact it appears "cleansed" simply by placing a military officer's name on the publication. Petitioner argues the only reason for the latter is that COL Nossov would have published petitioner's research absent the pathology, which if disclosed would likely be cited as evidence the military knew of the potential serious health risk untreated leishmaniasis may pose to deployed infected soldiers and their families. Given the size of the demand in the Brown's case and the increasing numbers of troops infected in Iraq and Afghanistan was and remains medical liability the military would chose to foreclose by denying petitioner's disclosure against public health policy.

Petitioner respectfully asserts that all retaliatory acts by respondent were immediately coincident with Petitioner's ongoing protected actions, e.g. reports to Congress and Inspector General (IG) testimony (latter at Senator Paul Sarbanes' request)[16] re deployed health risk foreclosed

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[15] Exhibit 2, Dist. Ct. Dkt. 55.

[16] Petitioner corresponded with her Congressional representatives, the Honorable Senator Barbara A. Mikulsi and the Honorable Paul Sarbanes, from October 2002-February 2006 regarding her public health concerns regarding the respondent's leishmaniasis program and risk it posed to public health of deployed (Quest. Presented 1), about 27 letters entered into evidence. Dist. Ct. docket doc #55, Ex. 13-14. Senator Sarbanes initiated an Inspector General investigation ongoing from about March 2003-February 2006.

Petitioner's disclosure in peer-reviewed scientific journals; and immediately coincident with Title VII participation and testimony, thus, should be reasonably interpreted in light of the all the facts and circumstances as impermissible retaliation in violation of public policy.[17]

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[17] Exhibits 13-14, Dist Ct. Dkt. 55.

II. To avoid a research grant agreement material financial obligation predicated on the research author-inventor's grant affiliation, may the respondent exercise copyright-like ownership against the plain meaning of 17 U.S.C. § 105 to administratively re-assign research authorship to non-author not grant affiliated; and, thereby, to create fictitious research records in support of replacement of the actual inventor with "administratively assigned inventor," who can not in fact meet 35 U.S.C. § 102(a),(f) requirements to be named inventor; i.e. executive agency actions, if upheld as valid, may redefine in practice statutory inventor from "inventor first to conceive" to "inventor by executive agency re-assignment"?

A. *The grant agreement at issue re new drugs proven effective by Petitioner's dog protocol, CO02-00, provided 70% license and royalties to named inventors and an African trust, while retaining only 30% to Walter Reed Army Institute of Research. Appendix B.*

Petitioner's dog drug testing protocol, CO02-00, support was initially awarded to Petitioner as a $75,000 supplement to a >$5,000,000/10 year, 1994-2004, international research "program project grant."[18]

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[18] Exhibit 1, Dist. Ct. Dkt. 18; and Exhibit 23, Dist. Ct. Dkt. 55.

The objective of the grant was to identify, purify, conduct preclinical (non-human) tests, necessary to bring to commercial market purified compounds isolated from traditional medicine herbs used to treat various infectious diseases in West and Central Africa. The grant sub-program project grant of which petitioner was Associate Program Director, focused on herbs used to treat parasitic and fungal infections. Petitioner's grant research focus was discovery of new therapies for leishmaniases.

This National Institutes of Health or NIH, grant program, the International Cooperative Biodiversity Group, or ICBG, was unique in that to receive funding, the sponsoring institution, Walter Reed Army Institute of Research or WRAIR, must execute an express agreement stating that in perpetuity (the agreement survived the duration of the grant) to receive the >$5,000,000 in ICBG research funds for 10 years, Walter Reed, WRAIR, had to agree patent license and royalties fees of drugs developed under the ICBG 70%, 15-20% to the named inventors [agreement p. 4, para. 4.03.1] and 50% [agreement p.5, para. 4.03.2] to the trust for West and Central Africa, while retaining only 30% [agreement p. 5, para. 4.03.3] for WRAIR in perpetuity [agreement p. 8, para. 8.04].[19]

The agreement also provided that copyright "in works of the parties shall be protected by use of copyright notices, where appropriate." [agreement, p. 5, para. 4.08]. These provisions of the agreement

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[19] Exhibit 6, Dist. Ct. Dkt. 60; and Exhibit 3, Dist. Ct. Dkt. 25; reproduced in Appendix B.

for the ICBG grant pertained to petitioner's dog protocol, CO02-00 new antileishmanials testing initially funded and approved by the ICBG program officials to whom research results of the protocol were regularly reported. *See* agreement, Exhibit 6, Dist. Ct. Dkt. 60; and Exhibit 3, Dist. Ct. Dkt. 25, relevant sections reproduced in Appendix B.

B. *Financial objective for reassignment of petitioner's protocol CO02-00 research is arguable science misconduct.*

Replacement of petitioner, a civilian ICBG *grant-affiliated* patents lead inventor-author, on Petitioner's dog protocol, CO02-00, and Petitioner's reports showing proof of new antileishmanials' efficacy, with a military officer, CPT Brianna Skinner [now, LCDR Brianna Skinner-Harris], *who was never affiliated with the ICBG grant*, would in all likelihood create "believable," albeit "fictitious," and thereby fraudulent, paper records to replace [wrongly] petitioner also on the respective drug patents to avoid WRAIR's 70% loss of antileishmanial license and royalties mandated by the ICBG benefits sharing agreement.[20]

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[20] Exhibit 6, Dist. Ct. Dkt. 60.

C. *Timeline for petitioner's protocol CO02-00 research reassignment [wrongly] as the work of CPT Brianna Skinner, nexus with Title VII (two cases litigated continuously from Nov. 2000 to Present, Dec. 2009) and communications with Congressional representatives Oct. 2002-Feb. 2006 (about 27 letters back and forth, with IG investigation).*

Petitioner reported to NIH the first two "cures" in two dogs using the new ICBG-developed drugs under protocol CO02-00 on 1 July 2002. Exhibit 6, Dist. Ct. Dkt. 55 contains a copy of the *signed and dated* report by petitioner and *countersigned and dated June 31, 2002 [July 1, 2002] by NIH Program Officer*, Dr. Joshua Rosenthal. Respondent became aware of petitioner's report either on July 1, 2002 or about 14-15 August 2002 when petitioner presented her same research in an oral presentation at the Institute.

As noted in part I herein, on or about 28 August 2002 petitioner filed notice to the Institute Animal Care and Use Committee, IACUC, Amendment #5, a written request and associated proofs of certification of adequate animal license certifications and housing for the dogs from Cornell, to move her 32 CO02-00 research dogs to Cornell Veterinary College, Ithaca, NY. On August 29, 2002, *within 24 hours of her filing to leave Walter Reed* to continue her research at Cornell, petitioner was charged with numerous protocol violations by her military supervisor, LTC Peter Joseph Weina, against whom her Title VII complaint was then be-

ing litigated, with trial anticipated within a couple of months.

Petitioner would have been able to improve her drugs patents within a year or two at Cornell and, thereby, WRAIR would have lost the value of petitioner's existing patents assigned to Walter Reed, because under the Bayh-Dole Act, 35 U.S.C. §§ 200-212, Cornell University, not Walter Reed, would have acquired ownership all subsequent patents' while petitioner worked at Cornell. Further, were petitioner to improve the antileishmanials formulation and administration schedule, Walter Reed's existing patent No. 6,403,576 B1 (issued in part from provisional serial no. 60/097,672 filed August 24, 1998) on which petitioner is author and lead inventor, would have been of substantial less value having been superceded by improved patented therapies assigned to Cornell.[21]

Petitioner respectfully argues, Walter Reed took the adverse actions to bring bogus animal protocol violations allegations against her both in Title VII retaliation and against protections of the First Amendment, because petition's court date was in August 2002 pending in a matter of weeks to further defame her, to avoid loss of the new proven effective (already FDA-approved) antileishmanials' patents value, to create an excuse to preclude her publications of the pathology data important for deployed, and to avoid the benefits sharing agreement to which petitioner's protocol CO0200 research was subject mandating Walter Reed's loss of

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[21] Exhibit 4, Dist. Ct. Dkt. 18, and Exhibit 25, Dist. Ct. Dkt, 55.

70% license and royalties from the new antileishmanials. Both ended petitioner's career, "taking" her >15 year research science achievement by misattribution and misappropriation and by precluding petitioner's employment at Cornell by threatening her new employer, Professor Steve Barr, Cornell College of Veterinary Medicine, to bring dog protocol charges against him as well to end his career, were he to persist in hiring Petitioner to continue her research in collaboration with Dr. Barr.[22]

Professor Barr told petitioner LTC Weina *threatened to end Professor's Barr's professional career as LTC Weina had ended petitioner's career, by making animal protocol violations charges against Professor Barr* were Professor Barr to persist to hire petitioner to continue her dog drug testing research at Cornell.[23] This latter may be viewed as a prohibited form of post-employment interference for which respondent employers have been found liable in retaliation.[24]

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[22] Exhibits 27 and 29, Dist. Ct. Dkt. 55. *See also*, Exhibits, Dist. Ct. Dkt. 11, 18, 20, 25, 50, 55, 60, incorporated by reference.

[23] Exhibit 27, Dist Ct. Dkt. 55.

[24] *See*, e.g. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (holding that the anti-retaliation includes former employees.) Similarly the employer was held liable for "blackballing" former employees to their new employers in *Ford v. Rigidply Rafters, Inc.*, 984 F.Supp. 386 (D. Md. 1997) (allegation the former employee was "suit happy" resulting in award of back pay.); *EEOC v. Metzger*, 824 F. Supp. 1 (D.D.C. 1993) (holding respondent employer liable when respondent employer informed new employer of employee's former EEO suit, resulting in bad treatment thereafter by new employer.);

D. *Respondent's Actions To Replace Petitioner on Petitioner's Research Maybe Considered to be Science Misconduct*

Were the respondent's action complained of by petitioner either to sound only in copyright or, alternatively, sound only in simple plagiarism· science misconduct Petitioner argues that the copyright standards for originality, i.e. absence of plagiarism, are also logically appropriate standards for plagiarism for determining science misconduct. *Feist Publications, Inc. v. Rural Telephone Service, Co., Inc.*, 499 U.S. 340 (1991) and *Childress v. Taylor*, 945 F.2d 500 (2d Cir. 1991) teach against replacing petitioner with CPT Brianna Skinner on petitioner's dog protocol CO02·00 and refiled·censored CO02·00 results to delete pathology relevant to health risk of deployed in research new drug progress reports.

In *Feist* the court held "the *sine qua non* of copyright is originality. To qualify for copyright protection, a work must be original to the author." *Feist*, 945 F.2d at 359·360. *Childress* teaches that "(1) for purposes of the Copyright Act's definition of 'joint work,' contribution of each joint author must be copyrightable; (2) in order for joint authorship to exist, each putative author must intend, at the time the contribution of each was created, that they would be treated as joint authors; and (3) where

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Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997) (holding disclosure to new employer that an employee had met with an EEO counselor was an unlawful act of retaliation even if the employee was rejected in the new job due to reasons unrelated to her having filed a job bias complaint.)

there was no evidence from which it could be inferred that playwright [plaintiff] ever shared actress' [defendant] notion that they were coauthors of play, actress' claim of coauthorship was properly rejected." *Childress*, 945 F.2d at 500.

Here, CPT/now, LCDR Brianna Skinner-Harris testified,[25] and it is affirmed also by timeline that petitioner's protocol as written was administratively terminated 30 September 2002 about two months before CPT Skinner took control of the protocol CO02-00 dogs, i.e. she neither executed as Principal Investigator, nor wrote one word of petitioner's >100 page protocol CO02-00, nor gave even one dog one dose of any experimental drugs designed for testing by said protocol using the protocol procedures, the latter also confirmed in daily signed and dated entries within the 32 dogs' veterinary records showing cessation of experimental protocol drugs' administration for every dog on or shortly prior to Sept. 30, 2002.

Rather, CPT Skinner testified under oath on September 27, 2008 (Exhibit 1 at Tr. 8:1-25-9:1-6, 11:2-14, Dist. Ct. Dkt. 55) she merely replaced another veterinarian on the protocol about late May 2002 to oversee the general health care of the dogs for about 4 months of a Petitioner's protocol CO02-00 ongoing for about 21 months, from November 2000-August 2002. Thus, CPT Skinner's work associated with petitioner's dog protocol was not of the nature and scope deemed a conceptual contribution that could stand alone as a research publication, re the *Childress* standard for originality and

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[25] Exhibit 1, Dist. Ct. Dkt. 55.

contribution warranting joint authorship; there was no agreement with petitioner for joint authorship absent any such conceptual contribution by CPT Skinner, nor had there been any such with the veterinarian CPT Skinner replaced. *Childress*, 945 F.2d at 500.

The policies and criteria for research authorship generally followed by most research institutions including Walter Reed are reiterated in an email from COL Russell E. Coleman for his subordinate staff's compliance.[26] This latter is compliant with the research science ethics policy training provided by the Office of the Staff Judge Advocate, U.S. Army Medical Research and Material Command to Walter Reed research scientists on science misconduct;[27] e.g. a powerpoint presentation of attorney, Stephen Maleson.

Here, CPT Brianna Skinner's and her supervisor COL Patricia Nossov's, [wrongful] claims to authorship of all petitioner's dog protocol CO02-00 and results, are arguably *noncompliant* with the plain meaning *both of institute practice and the executive agency regulatory policy and guidelines.* Respondent cites no legal authority for the "taking," arguable misappropriation by plagiarism and data falsification in fraud.

Petitioner respectfully asks the court to put the respondent to his proof, as naked assertions of "purported law" or "purported executive agency reg-

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[26] Exhibit 13, Dist. Ct. Dkt.18.

[27] Exhibit 3, Dist. Ct. Dkt. 55.

ulation" should not be permitted to stand in evidence against published regulation and guidelines. Further evidence of retaliation, is respondent's answer to petitioner's interrogatory #4; therein respondent admits there is *no scientist but petitioner* who ever had his or her research reassigned as the work of another based on animal protocol violations charges in the history of Walter Reed.[28]

Petitioner respectfully asserts respondent can not successfully argue law or policy because respondent's actions by CPT Brianna Skinner are precluded by both; and if such existed would drastically alter both copyright and patent law if applied in practice to science research. Respondent's defense to retaliation must therefore fail to knowing and intentional harm. Therefore, lower courts' findings to the contrary may logically be viewed as plain error.

The definitions of plagiarism and falsification for science misconduct for Walter Reed, according to Mr. Maleson, Esq., are those of the Public Health Service Policies on Research Misconduct; Final Rule, 42 C.F.R. §§50 and 93, (May 17, 2005). The 42 C.F.R. §93.103 Research Misconduct provides:

> Research misconduct means the fabrication, falsification, or plagiarism in proposing, performing or reviewing research, or in reporting research results.

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[28] Exhibit 8, page 5, Dist. Ct. Dkt. 55.

> (a) Fabrication is making up data or results and recording or reporting them.
>
> (b) Falsification is manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.
>
> (c) Plagiarism is the appropriation of another's ideas, processes, results, or words without giving proper credit.
>
> (d) Research misconduct does not include honest error or differences of opinion.

CPT Brianna Skinner, "replacing her name in fraud where Petitioner's had been" on petitioner's > 100 page protocol CO02-00 representing petitioner's >15 years of prior research, meets the definition of §93.103(c) "plagiarism," and misappropriation either of which or both are deemed via §93.103 "science misconduct." *Id.*

Plagiarism for science misconduct may reasonably be determined by applying the substantial similarity and the amount of copying test used to determine copyright infringement. 2 The Law of Copyright § 14:24 Unauthorized copying of a work's expression is a determination of "substantial similarity" between the two works even when the copying is intentional. *Eden Toys, Inc. v. Marshall Field & Co.*, 675 F.2d 498 (2d Cir. 1982). However, even the existence of great numbers of dissimilarities between the works will not excuse infringement. 2 The Law of Copyright § 14:24.

LCDR Skinner-Harris admitted under oath Sept. 27, 2009 at least 3 times she changed not one word of petitioner's >100 page protocol, nor wrote the results and accomplishments sections copying verbatim petitioner's sections filed nine months previous, but merely deleted all reference to leishmaniasis pathology and refiled those reports as her own by signature.[29] Judge Learned Hand stated, "[n]o plagiarist can excuse the wrong by showing how much of his work he did not pirate."[30]

Here, the professional harm done in retaliation to petitioner by misappropriation of her >15 years research and final new drugs' breakthrough is a circumstance no "reasonable scientist" may overcome by future hard work. Absent reversal, this "taking" ends petitioner's research science career. Fifteen years research loss showing finally a new drug breakthrough, even considered alone ab-

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[29] Exhibit 1 Dist. Ct. Dkt. 55, Deposition Sept. 27, 2008 of Brianna Skinner-Harris; Ex. 1, pp. 1-3; 10:19-22 & 36:23-25 & 38:4-11 & 76:17-24 [movant admits she never wrote one word of protocol CO02-00]; 39:2-23 & 46:12-24 [movant admits she copied Petitioner's dog protocol CO02-00 new drug research reports progress, achievement and data interpretive sections verbatim]; 50:6-13 [movant admits COL Patricia Nossov was her "senior supervisor"]; 61:9-15 [movant admits she took samples for PCR diagnostic testing]; 67:24-25 thru 69:25 and 76:25 thru 77:1 [movant admits she never sought nor received any grant money funding protocol CO02-00 at any time]; 90-91 [List of [Deposition] Exhibits]; 92 [Certificate of Reporter].

[30] *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir. 1936). *See also, Tennessee Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279 (5th Cir. 1970) (holding infringement of copyright is not confined to exact reproductions but includes colorable alterations made to disguise piracy.)

sent any other acts of retaliation against petitioner, is for most scientists about 25%-50% of their entire employment careers.

The respondent's defense simply fails any test to justify these disparate acts against petitioner as necessary to legitimate business practice. Walter Reed actually paid more money to retaliate than were respondent simply to have let petitioner leave for Cornell in 2002 unmolested, such argues against any legitimate business interest.

III. **May the respondent, to achieve objectives in Questions I and II, take actions materially adverse against the teaching of *Burlington Northern v. White*, 548 U.S. 53, 67-68 (2006) holding the anti-retaliation provision protects an individual from retaliation that produces injury/harm sufficient to dissuade a reasonable person in the plaintiff's position from making or supporting a charge of discrimination?**

Absent any validity, purely in retaliation for Title VII actions, the animal protocol violation charges none-the-less in fact ended petitioner's scientific research career. Absent court review, such charges once made may be reviewed only by the same Institution, foreclosing any impartial third-party fact-finding, a virtually unassailable form of retaliation against senior research scientists.

A. Animal Protocol Violations' Nexus With Petitioner's EEO Actions

The proximity in time for retaliatory action and nexus to Title VII litigation was always coincident. In the case of the animal protocol violations charges, LTC Peter Joseph Weina, who under oath stated he made the allegations, was present *August 22-23, 2002* when the possibility of petitioner leaving Walter Reed permanently to continue her research at Cornell was discussed. Walter Reed's Equal Employment Opportunity investigator, Mr. Duzor, embraced the idea and urged petitioner's immediate action to make her transfer to Cornell happen. Leishmaniasis in dogs is a class II pathogen, i.e. an infectious agent capable of infecting humans, therefore, identifying a research facility properly able to house and contain dogs naturally infected is difficult. Cornell was such a facility and petitioner had done some minimal prior research with Dr. Barr.

As indicated by his letter of October 4, 2002 (Exhibit 1, Dist. Ct. Dkt. 17), Dr. Barr was enthusiastic at the idea of petitioner conducting her dog research in his laboratory as his own research also dealt with canine leishmaniasis diagnosis and pathology, so petitioner's new antileishmanials drug research would further strengthen his research program at Cornell.

On or about August 28, 2002, petitioner was faxed all the required certifications from Cornell required by the Walter Reed Institute Animal Care and Use Committee, IACUC, to relocate her 32 research dogs to Cornell College of Veterinary

Medicine. Further, as senior GS14/08 research scientist, petitioner earned a sabbatical year for every seven years worked, she had worked over 21 years in 2002 earning three sabbaticals (taken none). Mr. Duzor, therefore, found a one year sabbatical "to get subsequent grant support established" a reasonable settlement; to include remaining research funds competitively awarded to petitioner to conduct her protocol CO02-00, >$105,000, and her 32 dogs transfer to Cornell with the understanding that even were petitioner not to gain any further funding, she would never return to Walter Reed post-sabbatical.

B. ***Protocol violations investigative process was fundamentally flawed: excluded petitioner, foreclosed knowledge of real allegations made for more than 4 years, accuser, LTC Peter Joseph Weina, had personal conflict of interest and did benefit by taking petitioner's 32 dogs and >$105,000 remaining funds for his unrelated polymerase chain reaction (PCR) diagnostic test development***

Petitioner, per Walter Reed's EEO investigator's urging to move swiftly to Cornell, wrote the required IACUC amendment #5, to move her 32 dogs to Cornell on or about *August 28, 2002, and within 24 hours, on or about August 28 or 29, 2002,* LTC Peter Joseph Weina, against whom Title VII petitioner's Title VII hearing was anticipated in a couple of months and was present *Aug. 22-23, 2002* when the EEO settlement was discussed, filed dog protocol violation charges against petitioner.

As detailed extensively in the court documents and briefs of petitioner, petitioner was excluded from the IACUC's investigative deliberations except for about two, two hour sessions, of weeks of meetings. Led in fact by LTC Weina, in late October, 2002, petitioner was removed as director of her own protocol CO02-00 and LTC Weina thereby gained administrative control of petitioner's 32 dogs and >$105,000 for about nine months, September 2002-April 2003, to use immediately thereafter, for his own polymerase chain reaction, PCR, diagnostic test development, a procedure wholly distinct and never part of petitioner's drug research protocol.

The Sept. 16, 2002, IACUC meeting transcript shows (Exhibit 36, Dist. Ct. Dkt. 11) and Peter Weina admitted in his deposition July 24, 2008, he is Witness 1, Tr. 55:15-16. who repeatedly reiterating his newly issued medical license "as a physician," before senior scientists of both the NIH grant agency and almost every Division within Walter Reed, [Tr. 77:5-15.] labeled petitioner a "freakin liar" who can't tell truth from lie because of unspecified mental impairment, never shows up for work, etc, etc. and should be precluded practice of her profession for the rest of her life. Tr. 78:7-12; Tr. 71:18-21; Tr. 75:17.

In his deposition July 24, 2008, LTC Weina admitted (i) he was a recent medical school graduate; (ii) he is not licensed to practice either psychiatry or psychology; Tr. 71:11-12. (iii) he never had a doctor:patient relationship with petitioner; Tr. 72:16-17. (iv) his assertions re mental status were not based on any test by a qualified licensed

practitioner. Tr. 71:20-21-72:1 Petitioner respectfully asserts, based on the rest of the tape transcript meeting discussion: e.g. what a problem employee petitioner was to file Title VII allegations against a military officer like LTC Weina, the latter defamation (Exhibit 36, Dist. Ct. Dkt. 11: IACUC 16 Sept 2002 court reporter transcribed transcript) was the actual protocol violations held and not the constantly shifting daily mix of "possible" allegations, revised almost hourly. Petitioner was never able to confront LTC Weina re any allegations he made, nor hear any purported witnesses' testimony.

C. *Petitioner continuously sought, 2002 thru the Present, impartial third party review of animal protocol allegations, exhausting administrative procedure, arguably rendering issue "ripe" for judicial review*

Petitioner, filed appeal with Office of Laboratory Animal Welfare late November 2002, amended her ongoing EEO complaint to include protocol charges in 2002 (but these were deemed outside the scope of the prior 2000-2005 EEO case). From 2002-2005, petitioner's attorney repeatedly requested respondent allow independent impartial third-party review of the protocol allegations made against petitioner, requests repeatedly denied.

After receiving three Freedom of Information Act, FOIA, 5 U.S.C. § 552 (2000), request denials and discovery denial for animal protocol allegations records, petitioner filed one more FOIA in 2005 (received in 2006) and with the new evidence of im-

propriety, in 2006 asked an attorney once again to file to obtain third party impartial review of the Walter Reed IACUC process and outcome on her behalf.

Prior, about Jan. 2002, the Office of Laboratory Animal Welfare or OLAW dismissed petitioner's request to review merely deferring back to the agency to self-investigate, as did the Office of Research Integrity in 2006, and in 2007, the Office of the General Counsel at NIH charged with investigation of science misconduct for petitioner's appeal for science misconduct stemming from the allegedly flawed IACUC proceeding. *See also, Abbs v. Sullivan,* 963 F.2d 918, 922, 929 (1992) (holding that the government's investigative procedures [Office of Research Integrity, Department of Health and Human Services] were invalid not having been promulgated in compliance with the Administrative Procedure Act; but also a scientist having exhausted administrative appeal or having a "ripe" issue may then permit judicial resolution.) In sum, petitioner did immediately and continuously pursue impartial third party review of the animal protocol allegations.

Absent federal court review there is no impartial third party administrative appellate process for review of animal protocol violations charges based on actual records. Here, LTC Peter Joseph Weina, petitioner's supervisor and accuser, completely rewrote petitioner's own dog protocol CO02-00 records allegedly "to help the IACUC in its investigation," petitioner was never afforded LTC Weina's revised research copies to defend the allegations, nor any other natural justice norms, e.g.

lack of notice of charge, lack of adequate opportunity to defend oneself, expulsion in bad faith [conflict of interest], violation of the regulation governing IACUC scope of authority (lacks authority to take punitive "taking" of research), insufficiency of accusation, tribunal not duly constituted, the actual allegations having nothing to do with animals or the protocol and those few provided in 2003-2004 court discovery, e.g. audio tapes of the meetings, having had all incriminating sections deleted compared to identical tapes obtained by FOIA in 2006 four years later.

Professional membership has been found to be quasi-judicial so that review by certiorari[31] may be deemed appropriate, see footnote 31 below. Declaratory relief has been granted the plaintiff in at least two of three cases.[32]

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[31] *See generally*, T.W. Cousens, *Suspension or expulsion from professional association and the remedies therefore*, 20 A.L.R. 2d 531 (2009), *citing People ex rel. Wilson v. Medical Soc. Of Duchess County* 84 Hun 448, 32 NYS 415 (1895) (holding that expulsion from professional membership may be viewed as semi-judicial or quasi-judicial or present a sufficient record to enable review in certiorari.

[32] *Weyrens v. Scotts Bluff County Medical Soc.* 133 Neb. 814, 277 NW 378 (1938) (declaration that expulsion was void, and asking injunction against depriving plaintiff of his rights as a member in good standing; relief denied); *Donaldson v. Institute of Botano-Therapy, Ltd.* 184 LT Jo 384 (1937, Ch Div) (declaration that plaintiff's name had been wrongfully deleted from the register of members, also asking order restoring it to same and an injunction restraining his exclusion from membership; relief granted). *Law v. Chartered Institute of Patent Agents* 2 Ch 276 (1919) (declaration that expulsion resolutions were invalid and ultra vires, also asking injunction against action thereon and against excluding plain-

D. ***Respondent's reprisal 2002-2006 (litigated continuously to present Oct. 2009) should be considered as "serial violation" retaliation constituting continuous interlinked reprisal to end petitioner's career.***

The doctrine of serial or continuing violation theory may be raised when facts alleged support its application even when the plaintiff did not specifically articulate the doctrine in the lower court. In the 1992 Sixth Circuit decision in *Haithcock v. Franks*,[33] the plaintiff, a former postal employee, alleged facts of serial violation in his EEO complaint but did not state the doctrine of continuing violation by name. The district court held he had waived the issue, and the Sixth Circuit reversed. The appellate court held it was sufficient that the plaintiff had alleged the facts upon which the legal theory could be grounded. In *Sosa v. Hiraoka*[34] the professor plaintiff filed a timely charge alleging discrimination in denial of promotion. He also alleged discrimination in denial of leave and travel expenses and an "augmented evaluation" process (essentially punitive in nature). The district court held these charges time-barred, and the Ninth Circuit reversed, holding the charges to be adequately related to a form of serial violation if proven.

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tiff from membership and from the privileges and benefits of membership; relief granted).

[33] 958 F.2d 671 (6th Cir. 1992).

[34] *Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990). *Contra, Fitzgerald v. Henderson*, 251 F.3d 345, 360 (2d Cir. 2001).

Petitioner's >7 years *continuous ongoing challenge* to the animal protocol charges made August 29, 2002 has cost her >$260,000 dollars in attorney and legal fees, and >$800 in FOIA page charges in 2006, several thousand for court reporter transcriptions of the various IACUC meetings in 2003, 2004, 2006, meetings to what in fact was really alleged against her, most having little to do with her dog protocol and much to do with her ongoing EEO litigation. Based on Respondent's assertions in error, the lower court found Respondent had repaid Petitioner's attorneys' fees in 2003.

Respondent neatly restricts the harm to the dates the animal protocol charges were given and investigated, ignoring petitioner's litigation spanning and continuous August 2002-present October 2009 as petitioner worked through first and second level administrative then federal court review (where deemed outside the scope of the case 2000-2005-never adjudicated) then taken to Office of Research Integrity in 2006 and Office of the Special Counsel at National Institutes of Health in 2007.

Petitioner respectfully states those facts and circumstances taken in totality of circumstances re Questions I and II, during ongoing EEO litigation and within weeks of EEO hearing schedule and her prompt compliance with Walter Reed EEO investigator's suggestion to settle in everyone's benefit by leaving August 2002 promptly for Cornell simply does not logically comport with the plain meaning of Fifth and Fourteenth Amendment "due process or equal protection" and does logically seem to

comport with forbidden personnel practices taught by *Burlington Northern v. White*[35] and agency investigative process that fails. Therefore petitioner respectfully argues that overturning the executive agency's IACUC protocol CO02-00 action against her is appropriate under Administrative Procedure Act of 1993, 5 U.S.C. §706 (2009).

E. *Admissions re purely legal matter may be deemed "of no effect."*

Regarding two admissions entered in defense by the respondent: first, respondent's attorney asked petitioner to "admit" during petitioner's deposition that the Honorable Judge Williams had issued his March 2008 opinion limiting the case to two issues, excluding that of the animal protocol violations, and if not answered, some form of sanctions were appropriate [presumably, Federal Rule of Civil Procedure 37]; second, the same request was made of petitioner during deposition with same legal threat "to admit" the IACUC "had made a decision regarding petitioner's alleged animal protocol violations allegations. This was material error in that the lower court admitted these two deposition answers as admissions against Constitutional due process and equal protection, and against the teachings of *Cedyco Corp. v. Whitehead*.

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[35] *Burlington Northern v. White*, 548 U.S. 53, 67-68, 126 S. Ct. 2405 (2006) (holding the anti-retaliation provision protects an individual...from retaliation that produces an injury or harm not limited only to ultimate employment decisions. The standard is the materiality of the challenged act to dissuade a reasonable person in the plaintiff's position from making or supporting a charge of discrimination.)

> a request for admission as to a purely legal issue is improper, and a deemed admission involving a *purely legal matter is of no effect*; because the primary purpose of requests for admissions is to simplify trial by eliminating matters about which there is no real controversy, *but requests for admissions were never intended to be used as a demand upon plaintiff or defendant to admit he had no cause of action* or ground of defense. (emphasis added) 4 Am. Jur. Trials § 215 (2009) *citing Cedyco Corp. v. Whitehead,* 253 S.W.3d 877, 880 (Tex. App. 2008). (emphasis added)

Petitioner argues that her two admissions re one the initial lower court's legal opinion and the second re executive administrative decisions were legal matters and were, therefore, properly may be deemed "of no effect" invoking *Cedyco. Id.* at 880.

F. *Petitioner Respectfully Asserts Animal Protocol Violations Charges Are Properly At Issue*

Petitioner also argues the animal protocol violations are properly before the court because the petitioner amended her complaint invoking Federal Rule of Civil Procedure 15 (a) ..."*once as a matter of course before the responsive pleading* is served...and (b) *amendments to conform to the evidence.*" Here, petitioner mistakenly entitled her request to amend, "Motion to Reconsider" but filed

the Rule 15 motion, Dist. Ct. docket doc. #18, before #19 "[Respondent's] Answer to Complaint," thus, petitioner's motion may be deemed timely "as a matter of course" to amend and also to conform issues to the evidence of both parties.

The animal protocol charges were found outside the scope of the petitioner's 2002-2005 litigation, thus were never prior adjudicated. For all these reasons, denial by the lower court to grant petitioner's motion to amend to place the animal protocol charges at issue and also to allow respondent's request(s) for admission of law to stand in evidence may be viewed as plain error despite petitioner's failure to object promptly. *Cedyco Corp. v. Whitehead,* 253 S.W.3d 877, 880 (Tex. App. 2008).

G. ***Not credible is respondent's defense to petitioner's assignment from duties of Senior Research Scientist/Program Manager [GS13-GS14/08] for >25 years to duties of a high school entry level technician rated by a professional employment specialist as (GS5-9) was appropriate because "the program in which petitioner worked no longer existed" from about Sept. 30, 2002-2006.***

Petitioner respectfully argues that respondent offers no credible evidence embodied in any writing for the mere oral assertions that petitioner was properly demoted to technical duties from April 2004-July 2006 because the program in which she worked, then a >$12,000,000 Congressionally funded program from 2003-2006 "no longer ex-

isted." Published contradictory evidence entered into evidence and argued vigorously by petitioner is herewith provided again. Exhibit 38, Dist. Ct. Dkt. 55. [2006 published leishmanial *new drug research annual* progress report to Major General Eric B. Schoomaker], Exhibit 12, Dist. Ct. Dkt. 18. [published two consecutive annual postdoctoral recruitment booklets, recruiting lower level postdoctoral [contract] employee to conduct petitioner's new antileishmanial drug research, one issued in 2003, second issued in 2004, petitioner is mentioned by name in both published recruitment advertisements.] Thus, petitioner respectfully argues respondent's defense "no program existed" should be deemed of no merit, a material error, and the retaliation petitioner alleged should be found.

IV. The Court Should Hear This Case Now

The facts and circumstances in this case raise issues having profound medical implications for tens of thousands of deployed military and their families (Part I) and also impacting a majority of senior research scientists in this country. Data complied by the National Science Foundation (NSF), reported in 1990, showed that the federal government was the largest single employer of scientists and engineers in the United States.[36]

The Department of Defense employed the largest number (DOD, 49%), followed by The Department of Agriculture (USDA, 12.8%),

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[36] Alan K. Campbell, Linda Dix, *Recruitment, Retention, and Utilization of Federal Scientists and Engineers*, 99 (Natl. Academy Press 1990).

Department of the Interior (6.8%), National Aeronautics and Space Administration (NASA, 5.5%), Department of Health and Human Services (HHS, 3.9%), and Department of Commerce (3.7%).[37] Executive agency restrictions placed on dissemination of research results negatively impacts the pace of United States' research progress, jeopardizes public health protection, health advancements, and is an overriding disincentive for productive scientists to remain in federal service.

Scientists are rated, for grant awards, pay, and employment mobility based on the quality and the quantity of the peer-reviewed research publications. "Publish or perish" is reality, to remain a research science professional. It follows, therefrom, for the respondent not only to deny petitioner disclosure of the ultimate achievement success of >15 years hard meticulous work, but assigning the new drug breakthrough as the achievement of one who merely replaced petitioner's name fraudulently on petitioner's protocol and progress reports ended petitioner's research career not only in government, but anywhere particularly combined with two felony allegations, and defamation before two federal institutes as mentally and morally impaired.

The respondent's actions are properly viewed not as isolated acts but rather considered in totality taken as a whole creates a 15 year "hole" of lost research productivity for petitioner by respondent's acts arguably meeting legal definitions of data falsification, plagiarism, and also, misappropriation, taken as a whole can not be overcome constituting

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[37] *Id.* at 99.

almost 50% of her professional career in science. Nor, petitioner respectfully argues, should such be a burden that should placed in Title VII retaliation and against the First Amendment on any senior scientist-petitioner to overcome.

Petitioner respectfully asserts the respondents' failed their burden of proof, basing their defense on unsubstantiated assertions and error both of fact and of law, as herein discussed, and, therefore, be logically viewed as plain material error and overturned as such.

PETITION FOR TRIAL *DE NOVO* AND FOR CERTIORARI

1. On October 19, 2009, Joan E. Jackson, petitioner, filed in the court of The Supreme Court of the United States showing there is no other adequate, plain, or speedy remedy at law or in equity requests certiorari.

2. Joan E. Jackson respectfully petitions the Court for issuance of a writ of certiorari for trial *de novo* for *supersedeas* of the judgment of the United States Court of Appeals for the District of Maryland on this case.

Dated this 24th day of December 2009.

Dr. Joan E. Jackson, PhD,
Petitioner *Pro se*
P.O. Box 1505
Onset, Massachusetts 02558-1505
Cell Phone: 301-661-9002
Email: jacksonall@aol.com

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APPENDIX A

Document: 20 FILED: July 21, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAN E. JACKSON,	)	
Plaintiff – Appellant	)	
vs.	)	
PETER GEREN,	)	No. 09-1081
The Honorable, Acting Secre-	)	(8:07-cv-00851-AW)
tary, Department of the Army,	)	ORDER
Defendant – Appellee	)	
vs.	)	
BRIANNA SKINNER-HARRIS,	)	
Movant	)	

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Shedd, and Judge Agee.

For the Court
/s/ Patricia S. Connor, Clerk
Patricia S. Connor, Clerk

Document: 17-1 FILED: May 13, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAN E. JACKSON,	)	
Plaintiff – Appellant	)	
vs.	)	
PETER GEREN,	)	No. 09-1081
The Honorable, Acting Secre-	)	(8:07-cv-00851-AW)
tary, Department of the Army,	)	JUDGMENT
Defendant – Appellee	)	
vs.	)	
BRIANNA SKINNER-HARRIS,	)	
Movant	)	

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ Patricia S. Connor, Clerk
Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOAN E. JACKSON,	)	
Plaintiff – Appellant	)	
vs.	)	
PETER GEREN,	)	No. 09-1081
The Honorable, Acting Secre-	)	(8:07-cv-00851-AW)
tary, Department of the Army,	)	JUDGMENT
Defendant – Appellee	)	
vs.	)	
BRIANNA SKINNER-HARRIS,	)	
Movant	)	

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Alexander Williams, Jr., District Judge.

Submitted: April 29, 2009 Decided: May 13, 2009

Before the Honorable Circuit Judges: WILKINSON, SHEDD, and AGEE

Affirmed by unpublished per curiam opinion.

Counsel: Joan E. Jackson, Appellant, *Pro Se*;
Alex Gordon, Assistant United States Attorney, Baltimore, Maryland, for Appellee

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Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Dr. Joan E. Jackson appeals the District Court's order granting summary judgment in favor of the Honorable Peter Geren, Acting Secretary, Department of the Army, on her claim for retaliation pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000). We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons given by the District Court. *Jackson v. Geren*, No. 8:07-cv-00851-AW (D. Md. Nov. 14, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

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MEMORANDUM OPINION

Plaintiff Joan E. Jackson ("Plaintiff"), acting *pro se*, brings this action against Defendant Peter Geren, Acting Secretary, Department of the Army ("Defendant"), pursuant to Title VII of the Civil Rights Act of 1964, §§ 701, *et seq.* and 42 U.S.C.A. §§ 2000e, *et seq.*, claiming retaliation for filing an Equal Employment Opportunity ("EEO") Complaint and participating in court hearings against the Secretary of the Army regarding discrimination, and injurious falsehood.[1] Currently pending before the Court is Defendant's Motion to Dismiss or, in the Alterna-

[1] The specific "injurious falsehood" claimed by the Plaintiff is defamation. Thus, "injurious falsehood" and "defamation" will be used interchangeably throughout this document.

tive, Motion for Summary Judgment (Doc. No. 6).[2] The Court has reviewed the entire record, as well as the Pleadings and Exhibits, with respect to the instant motion. No hearing is deemed necessary. *See* Local Rule 105.6 (D. Md. 2008). For the reasons set forth below, the Court will GRANT-IN-PART and DENY-IN-PART Defendant's motion.

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[2] Plaintiff has also filed a Motion for Summary Judgment or, in the Alternative, Jury Trial (Doc. No. 11). The Court, however, will construe this motion as Plaintiff's response in opposition to Defendant's Motion. While Plaintiff has filed Docket Entry Number 11 as a "Motion for Summary Judgment" and Plaintiff makes reference to her filing being a "Motion for Summary Judgment or, in the Alternative, Jury Trial," Plaintiff never sets forth a standard for summary judgment, nor does she refer to the standard throughout her response. Plaintiff also asks the Court to grant her directed verdict or, in the alternative, jury trial on the issues presented before the Court. The Court recognizes, as Plaintiff has even acknowledged, the potential legal deficiencies in her documents, as Plaintiff admits to not having professional legal training or experience. Considering such deficiencies, the Court does not believe that Plaintiff has properly made and supported a motion for summary judgment. Instead, Plaintiff's filing appears to be a response to Defendant's motion for summary judgment, instead of an actual motion or cross-motion for summary judgment. Furthermore, to the extent that Plaintiff's response can be considered as a motion for summary judgment, the Court does not believe that Plaintiff has presented a sufficient basis for establishing summary judgment on the issues currently before the Court.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are taken in the light most favorable to the non-movant. Plaintiff Jackson is a 59-year-old Ph.D. senior research scientist. In March 1981, Plaintiff was hired by the Department of the Army, based at the Walter Reed Army Institute of Research ("WRAIR"), as a civil service civilian, GS-13 Supervisory Research Zoologist. Plaintiff was promoted to GS-14 step 05 in 1991, and worked in the Department of Parasistology, Division of Experimental Therapeutics ("DET") until April 2004, when she was placed on temporary detail with the Department of Entomology, Division of Communicable Disease and Immunology ("DCD&I").

On February 21, 2001, Plaintiff filed a formal EEO complaint against WRAIR, claiming discrimination based on her age,[3] gender (female), and reprisal (based on a previous claim of discrimination Plaintiff had filed alleging sexual harassment and harassment on the job).[4] Plaintiff amended her formal complaint of discrimination in July 2001 and again in November 2001. On February 27, 2002, Plaintiff requested a hearing before an administrative judge at the Equal Employment Opportunity Commission ("EEOC"). In November 2002, as a result of the hearing proceeding, Plaintiff reached an initial settlement

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[3] At that time, Plaintiff was 52 years old.

[4] Plaintiff filed an informal complaint of discrimination with WRAIR's EEO office on November 17, 2000.

with WRAIR, whereby Plaintiff would retire from the facility and receive attorney's fees. During the period of settlement discussions, Plaintiff was placed on paid administrative leave.

In April 2003, Plaintiff filed a breach of settlement claim with the Department of the Army, Equal Opportunity Compliance and Complaints Review Agency ("Compliance Agency"). In a decision dated May 20, 2003, the Compliance Agency concluded that the settlement agreement was invalid because it did not meet the statutory requirements of the Older Workers Benefit Protection Act, and ordered WRAIR to resume processing of Plaintiff's case. Plaintiff subsequently re-instituted her complaint, which she later filed in federal court. Litigation ensued, during 2004-2005, as to whether WRAIR discriminated against Plaintiff on the basis of gender, age, sexual harassment, harassment on the job, and reprisal. Judge Roger Titus, United States District Judge for the District of Maryland, found for the Agency in 2004 and dismissed Plaintiff's complaint. Plaintiff appealed her case to the United States Court of Appeals for the Fourth Circuit, which affirmed Judge Titus' dismissal.

Plaintiff subsequently filed this action as an EEO complaint, which she later dismissed in order to bring her claims in federal court. Plaintiff filed suit in this Court on April 3, 2007, alleging retaliation and injurious falsehood.

STANDARD OF REVIEW

Defendant has moved this Court to dismiss for failure to state a claim on the basis of Fed. R. Civ. P. 12(b)(6) or, in the alternative, for summary judgment on the basis of Rule 56. "A court only considers the pleadings when deciding a Rule 12(b)(6) motion." *Villeda v. Prince George's County*, 219 F. Supp. 2d 696, 698 (D. Md. 2002). However, if matters outside the pleadings are presented to and not excluded by the court, the motion must be considered under the summary judgment standard of Rule 56. *Id.*; *see also* Fed. R. Civ. P. 12(d). All parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. *Nat'l Mortgage Warehouse, LLC v. Trikeriotis*, 201 F. Supp. 2d 499, 502 (D. Md. 2002). Where a party knows that materials outside the pleadings are before the court, that party is considered to have notice that the motion to dismiss may be treated as a motion for summary judgment. *Id.*; *see also Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985) (noting that the requirement that all parties must be given "reasonable opportunity" to present relevant information to the Court may be satisfied if a party is "aware that material outside the pleadings is before the court").

While Defendant has entitled its motion as a Motion to Dismiss or, in the Alternative, Motion for Summary Judgment, both parties have submitted matters outside the pleadings and both rely on such documents extensively in their briefs. Furthermore, it does not appear that Plaintiff necessarily opposes converting the motion, as

she not only titled her response in opposition to Defendant's motion as a "Motion for Summary Judgment or, in the Alternative, Jury Trial," but also attached an exhaustive compilation of exhibits – even more than Defendant – to her response brief. Thus, this Court will consider Defendant's motion as one for summary judgment and rule accordingly.[5]

Summary judgment is appropriate only if there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986).

When ruling on a motion for summary judgment, the court must view the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The moving party discharges its burden by showing an absence of evidence to support the

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[5] Courts also consider how a party captions its own pleading. Laughlin v. Metro Washington Airports Auth., 149 F.3d 253, 261 (4th Cir. 1998). *See Montrose Educ. Servs. v. Sylvan Learning Sys.*, No. RDB-06-308, 2007 U.S. Dist. LEXIS 23697 at *7 n.5 (D. Md. 2007) ("Given that the Defendants in this case moved for dismissal or summary judgment, that the Plaintiff captioned its Opposition [] in a similar fashion, and that both the Defendants and the Plaintiff attached documents to their briefs, all three parties were certainly on notice that this Court might make a summary judgment determination. In addition, Plaintiff did not request additional time for discovery in its Opposition. Thus, they have had a reasonable opportunity to provide material regarding summary judgment, in satisfaction of Rule 12(b).").

non-moving party's case. *Celotex*, 477 U.S. at 325. When faced with a motion for summary judgment, Rule 56(e) requires the non-moving party "to go beyond the pleadings" and show the existence of a genuine issue for trial, by way of affidavits, deposition testimony, or answers to interrogatories. *Id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). While the evidence of the non-movant is to be believed and all justifiable inferences drawn in his or her favor, a party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences. *See Deans v. CSX Transp., Inc.*, 152 F.3d 326, 330-31 (4th Cir. 1998); *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985).

DISCUSSION

I. RETALIATION

To establish a claim for retaliation, Plaintiff must show: (1) she engaged in protected activity; (2) Defendant took action that would be "materially adverse to a reasonable employee or job applicant;" and (3) there is a causal connection between the protected activity and the asserted adverse action. *Burlington N. & Sante Fe Rwy. Co. v. White*, 126 S. Ct. 2405, 2409 (2006); *see also Lettieri v. Equant, Inc.*, 478 F.3d 640, 650 (4th Cir. 2007). In determining whether the alleged retaliatory action is materially adverse as required for the second element, the Court should ask whether it was harmful enough to "dissuade a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 126 S. Ct. at 2409.

If Plaintiff establishes a *prima facie* case of retaliation, Defendant must then offer a legitimate, nondiscriminatory basis for the adverse employment action. *Matvia v. Bald Head Island*, 259 F.3d 261, 271 (4th Cir. 2001). Provided that the defendant is able to satisfy this burden, Plaintiff then has the opportunity to prove that the asserted reason is pretextual. *Id.* This can be accomplished by showing that the employer's explanation is "unworthy of credence or by offering other forms of circumstantial evidence sufficiently probative of [retaliation]." *Price v. Thompson*, 380 F.3d 209, 212 (4th Cir. 2004).

Here, it is undisputed that Plaintiff engaged in protected activity where she filed EEOC complaints and offered testimony against Defendant.[6] Defendant, however, argues that Plaintiff cannot establish the other two elements. In her complaint, Plaintiff alleges that Defendant discriminated against her by taking adverse employment actions by: (1) giving her negative performance evaluations, despite her history of receiving "topmost" annual performance ratings for every year that she was employed at WRAIR, in addition to performance and achievement awards and letters of appreciation; (2) restricting Jack-

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[6] In her complaint, Plaintiff also alleges that she participated in an investigation against the Secretary of the Department of the Army in 2002, 2003, and 2004, and corresponded with United States Senators Paul Sarbanes and Barbara Mikulski regarding mismanagement of patient diagnostic programs related to the Gulf War Syndrome. Plaintiff also alleges that she cooperated in a court hearing against the Secretary of the Department of the Army on her discrimination charges.

son's ability to publish her research and carry out further research; (3) creating impediments to work;[7] and (4) demoting Jackson to an inferior lab position.

Defendant separately discusses each of Plaintiff's four allegations of reprisal and appears to suggest that each alleged retaliatory act should be considered individually to determine if the retaliation claim can withstand a motion to dismiss or summary judgment. The Supreme Court has stated that "the significance of any given act of retaliation will often depend upon the particular circumstances." *Burlington*, 126 S. Ct. at 2415. "The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed." *Id.* (citing *Oncale v. Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1003). As such, the Court will evaluate the claims related to retaliation "from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Burlington*, 126 S. Ct. at 2417.

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[7] Plaintiff's complaint and brief seem to suggest that the "impediments to work" claim is embodied in other claims of retaliatory acts (performance evaluation, restrictions on publication, and demotion). Therefore, the Court will address this claim together with the other claims of retaliatory acts.

A. Performance Evaluation

Plaintiff alleges that prior to her participation in protected activity, she received excellent and topmost annual job performance evaluations every year of her employment at WRAIR. Plaintiff contends that her performance evaluations deteriorated within six months of her filing the EEO complaint. Defendant argues that Plaintiff did not experience any materially adverse consequences from the performance evaluations. Defendant notes that Plaintiff's June 30, 2002 performance rating was an "86 out of 100." While Defendant agrees that the rating was lower than ratings Plaintiff had previously received, Defendant maintains that Plaintiff was still in the "superior" category and that the performance rating had the same outcome as Plaintiff's previous evaluations. Defendant also states that Plaintiff's "rater" recommended that she receive the same shares from the bonus pool as she had been awarded in previous periods.

Moreover, Defendant maintains that giving a poorer than expected evaluation does notconstitute adverse employment action. To support its argument, Defendant cites *James v. Booz-Allen & Hamilton, Inc.*, 368 F.3d 371, 377 (4th Cir. 2004), where the Fourth Circuit has held that performance evaluation is only actionable when the employer uses it to "detrimentally alter the terms or conditions of the recipient's employment." Plaintiff does not articulate to what extent she was adversely effected by the 2002 performance appraisal, nor is there anything in the record to suggest that the evaluations were used to "detrimentally alter

the terms or conditions of" Plaintiff's employment. *James*, 368 F.3d at 377.

Here, the record reflects that Plaintiff's performance rating had the same outcome as her previous evaluations. Moreover, Plaintiff's ratings still placed her in the "superior" category and recommended that she receive the same shares from the bonus pool as she had been awarded in previous periods. Based on these circumstances, the Court does believe that the negative performance evaluations constitute a materially adverse employment action that would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington*, 126 S. Ct. at 2415. Therefore, the Court finds that Plaintiff cannot sustain a retaliation claim based on the negative performance evaluations and, accordingly, must grant summary judgment in favor of Defendants.

B. Restrictions on Publishing

Plaintiff next alleges that she was not allowed to publish her work after participating in court hearings against the Department of the Army. On June 10, 2004, Plaintiff submitted one abstract and one review paper to her superiors for approval prior to publication. Through her lawyer, Plaintiff later submitted two additional papers in August 2004, and requested that her coauthors be given approval for these publications as well. Plaintiff alleges that clearance for these publications were unnecessarily delayed in retaliation for Plaintiff's past EEO actions. Additionally, Plaintiff claims that, prior to her partici-

pation in protected activity, she had published her work for 30 years; however, she was permanently precluded from publishing after such participation. Plaintiff also asserts that, in addition to WRAIR precluding and delaying the disclosure of her research, her assignment to the inferior lab position effectively hindered her ability to publish because she was no longer designing and executing work independently.[8]

Plaintiff notes the importance of publishing to scientists and states that grants to conduct further research are directly linked to the peer-reviewed science journal publications regarding current research progress.

Considering the evidence presented with respect to delay and restriction in publication, the Court finds that Plaintiff has satisfied the second element – that Defendant's action was materially adverse to a reasonable employee. Being delayed and/or completely restricted from publishing, after publishing for 30 years, can certainly be characterized as "materially adverse" to a reasonable employee. The Court also notes Plaintiff's argument that, as a senior scientist who is expected to publish and present work, Plaintiff's publications are directly linked to obtaining funding for additional research.[9] As to the third element, drawing all inferences in favor of Plain-

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[8] Plaintiff's reassignment will be discussed in detail below.

[9] See Def.'s Ex. 1 at 202-03 (noting "without funding for a project it's fairly difficult - you can't start your own research without some funding []").

tiff, there is sufficient evidence from which a jury could find a causal connection between Plaintiff filing and amending her EEO complaints – which ultimately resulted in Plaintiff filing suit against Defendant for discrimination in May 2004, less than one month before Plaintiff submitted her first abstract and review paper for approval for publication – and the alleged retaliatory actions. *See Causey v. Balog*, 162 F.3d 795, 803 (4th Cir. 1998) (holding that proximity in time between the protected activity and the adverse employment action may be sufficient to establish the causation requirement).

Having found that Plaintiff has established a *prima facie* case for retaliation based on delay and restrictions in publishing, Defendant must now articulate some legitimate, nondiscriminatory reason for such delay and restriction. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (noting that the burden shifts to "the employer to articulate some legitimate, nondiscriminatory reason" for its action). Here, Defendant contends that any delays faced by the Plaintiff with respect to publishing were normal, and notes that it was common for WRAIR employees to have to wait between three and six months to be authorized to publish due to a backlog of such requests. Defendant further contends that delay also resulted from a research protocol conducted by

Plaintiff that violated WRAIR protocols.[10] Defendant presented evidence establishing that the approving Colonel responded to Plaintiff's requests for authorization for publications in a timely manner – less than a month after Plaintiff requested authorization for publication – and made reasonable requests for additional information before he could authorize release of the work. Defendant also notes that the requests for additional information resulted from WRAIR requirements that researchers not use any data obtained from studies in which animals were treated improperly, and, before the Colonel would give his approval, he sought to gain assurance from Plaintiff that she did not use that data.[11] Moreover, Defendant contends that, with regard to authorization for release of the abstract, Plaintiff acknowledged the possibility that WRAIR might not be able to approve release before her conference because she recognized that WRAIR had a six-month approval time. Defendant also notes, in regards to Plaintiff's request for authorization of the two additional papers, that WRAIR informed Plaintiff's attorney that approval would take longer than expected because

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[10] Plaintiff notes that the validity of the animal protocol allegations is currently being appealed in a non-EEO legal venue.

[11] Defendant contends that Plaintiff admitted to protocol violations – Animal Study Protocol #CO02-00 – in her animal testing research. Because of the violations, the approving Colonel wrote to Plaintiff requesting that Plaintiff confirm that her articles did not cite data obtained through research protocol C002-00 because WRAIR did not authorize publication of research obtained in studies that have violated WRAIR protocols.

approving Colonels were on duty at other sites. Defendant also notes that Plaintiff's first two submissions were approved on September 3, 2004.

Based on the evidence presented, the Court finds that Defendant has articulated a legitimate, non-discriminatory reason for its action with respect to delay in publishing. Thus, the burden shifts back to the Plaintiff to present evidence that this reason was pretextual. *See McDonnell Douglass*, 411 U.S. at 804. Some factors this Court may consider in deciding whether there is sufficient evidence of a pretext include: "the strength of the plaintiff's *prima facie* case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case . . . ." *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148-149 (2000). Here, Plaintiff has not shown this Court sufficient evidence for a trier of fact to reasonably conclude that Defendant's proffered reasons with respect to the delay in publication were pretextual or false. Thus, the Court finds that Defendant is entitled to judgment as a matter of law with respect to Plaintiff's retaliation claim based on delay in publishing.

The Court, however is not persuaded that Defendant has sufficiently presented a legitimate, non-discriminatory reason for its action with respect to restrictions on Plaintiff's publication. While Defendant focuses more on the delay in publication and notes that Plaintiff's first two submissions were approved, Defendant fails to state reasons for denying "unconditional clearance"

and complete restriction for Plaintiff to publish.[12] Therefore, the Court cannot grant summary judgment with respect to the restrictions in publishing.

C. Demotion

Plaintiff also alleges, with respect to her retaliation claim, that after being on administrative leave for sixteen months – pending an investigation by the EEO of the Agency for misconduct associated with the 2002 EEO settlement breach – she was ordered to return to work to perform assigned technical duties. Plaintiff states that she was not assigned to her previous position as a Laboratory Director/Program Manager/Senior Scientist (GS14/08, which she had been for over 10 years) in the Department of Parasistology, Division of Experimental Therapeutics ("DET"), but was instead given a temporary 120-day Ph.D. entry level technical support position (GS5-7) in the Department of Entomology, Division of Communicable Disease and Immunology ("DCD&I"). Despite this position initially being a temporary 120-day position, Plaintiff's placement was extended on several occasions, resulting in Plaintiff serving in this position for over two years – from April 2004 until approximately July 2006. Plaintiff further asserts that this position was more administrative in nature, and that official employment records reflected that she was a "technician" and not a "Laboratory Direc-

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[12] Plaintiff claims there was an absolute preclusion to publish her research findings under her own name as lead or senior author for over four years and into the indefinite future. *See* Pl.'s Ex. 22.

tor/Program Manager (Supervisor)" for that time period.

Defendant asserts that Plaintiff had not completed the training requirements as mandated by WRAIR's Institutional Animal Care and Use Committee ("IACUC") before resuming to work with animals, and, thus, Plaintiff was not qualified to return as a Preliminary [Principal] Investigator. Defendant also asserts that a "reasonable employee" would not have found the new position to be materially adverse because Plaintiff received the same salary and remained at the same work grade. Defendant also attributes "funding reductions" as an additional reason for preventing Plaintiff from returning to her previous position.

Based on the Court's review of the record, it appears that a trier of fact could conclude that Plaintiff's placement in April 2004 is considerably different from her previous position. Plaintiff went from a supervisory role, primarily responsible for facilitating research, securing funding, and publishing associated research (alleged grade of GS14), to one involving technical duties and support (alleged grade of GS5-7). The loss of supervisory or managerial authority cannot neatly be classified as de minimis, intangible, or unmeasurable. *Csicsmann v. Sallada*, 211 Fed. Appx. 163, 169 (4th Cir. 2006). While "reassignment with significantly different responsibilities" can give rise to Title VII action, the reassignment "must have significant detrimental effect[s]." *Boone v. Goldin*, 178 F.3d 253, 256 (4th Cir. 1999). Plaintiff states that by virtue of being in that position,

her ability to publish was hindered, as she was permanently precluded from disclosing her unprecedented research associated with her previous position, and thus, completely restricted from publishing. The Court notes that the reasons for such complete restrictions are in dispute. Plaintiff further asserts that such demotion not only restricted resources, but it effectively precluded future opportunity for her professional development and continued professional employment.

Considering Plaintiff's reassignment to a position that is, according to Plaintiff, of a substantial lesser grade with inferior duties and responsibilities, along with facts denoting absolute restrictions on publishing, the Court finds that Plaintiff has satisfied the second prong – that Defendant's actions were materially adverse to Plaintiff. There is also sufficient evidence from which a jury could find a causal connection. The position reassignment took place immediately after Plaintiff was removed from administrative leave pending the EEO investigation of the Agency, and Plaintiff's request for publication, made in June 2004, was made subsequent to her filing her EEO complaint and in the midst of pending litigation against Defendant for discrimination. Therefore, viewing the evidence in the light most favorable to Plaintiff, the Court finds that Plaintiff has established a *prima facie* case for retaliation with respect to the demotion.

Now shifting the burden, the Court expresses some reservation with respect to whether Defendant has presented a legitimate, non-discriminatory reason for Plaintiff's reassignment

to the entry level technical support position. Specifically, the Court has not been persuaded by Defendant's justification for requiring Plaintiff, a person with a wealth of years of directorial, managerial, and supervisory experience at the WRAIR, to remain in a temporary 120-day entry-level technical support position, with substantially different duties and responsibilities, for approximately two years. Therefore, viewing the evidence in the light most favorable to Plaintiffs, the Court cannot, at this point, grant summary judgment in favor of Defendant, and will, instead, allow Plaintiff's retaliation claim on the grounds of the demotion to the inferior lab position to proceed.

II. Injurious falsehood

Plaintiff next alleges that Defendant defamed her in a conversation with Stephen Barr of Cornell University, director of a lab to which Plaintiff was hoping to move her research. The Federal Tort Claims Act ("FTCA") provides a vehicle through which a claimant can recover damages resulting from a tort committed by the government. 28 U.S.C. § 1346 (b)(1). While the FTCA waives the United States' sovereign immunity for certain torts, the Act allows the government to retain immunity from suits predicated upon "[a]ny claim arising out of . . . libel, [or] slander . . . ." *Id.* at § 2680(h).

Defendant argues that Plaintiff's defamation claim is barred by the FTCA. Although Plaintiff contends that the government waived sovereign immunity because Plaintiff raised a

grievance of defamation through Administrative Procedures invoking the Administrative Procedure Act,[13] the Court finds no support, and Plaintiff has offered none, for the position advanced by Plaintiff. Therefore, as Plaintiff has attempted to bring a defamation claim against WRAIR, a government entity, the Court must dismiss Plaintiff's claim as the government has retained immunity from such claim under the FTCA. Accordingly the [C]ourt will grant summary judgment as a matter of law in favor of Defendant.

CONCLUSION

For the foregoing reasons, the Court will GRANT-IN-PART Defendant's Motion for Summary Judgment as to Plaintiff's injurious falsehood claim and Plaintiff's retaliation claim with respect to negative performance evaluations and delay in publishing and DENY-IN-PART Defendant's motion as to retaliation on the grounds of restriction from publishing and demotion, as there are still material facts in disputes regarding the change in position, grade level, duties, and responsibilities, as well as disputes regarding Defendant completely restricting Plaintiff from publishing. The Court will set this matter for trial on the

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[13] Plaintiff cites 5 U.S.C.A. § 704 to support her proposition; however, this section relates to "Actions Reviewable" and does not address the issue of whether the government has waived sovereign immunity.

remaining issues.[14] An Order consistent with this Opinion will follow.

March 25, 2008
Date

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

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[14] The Court strongly encourages Plaintiff to employ counsel to assist her in litigating this action.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

****

ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this **25th day of March, 2008**, by the United States District Court for the District of Maryland, hereby **ORDERED:**

1. That Defendant's Motion to Dismiss or, in the Alternative, Motion for Summary Judgment (Doc. No. 6) BE, and the same hereby IS, **GRANTED-IN-PART** and **DENIED-IN-PART;**

2. That Plaintiff's Motion for Summary Judgment or, in the Alternative, Jury Trial (Doc. No. 11) BE, the same hereby IS, **TERMINATED**;[1]

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[1] As explained in the Memorandum Opinion, the Court will treat Plaintiff's Motion for Summary Judgment as Plaintiff's response in opposition to Defendant's Motion for

3. That this matter be set for trial on all remaining issues;

4. That the Clerk of the Court transmit a copy of this Memorandum Opinion and Order to all counsel and parties of record and mail a copy to the pro se Plaintiff.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

Summary Judgment. Therefore, the Court asks the Clerk to terminate Plaintiff's motion as such.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

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ORDER

For the reasons stated in the accompanying Memorandum Opinion, IT IS this **14th day of November, 2008**, by the United States District Court for the District of Maryland, hereby,
ORDERED:

1. That Defendant's Motion for Summary Judgment (Paper No. 46) BE, and the same hereby IS, **GRANTED**;

2. That Plaintiff's Cross Motion for Summary Judgment (Paper No. 55 and 60) BE, and the same hereby IS, **DENIED**;

3. That the various Motions contained in Paper No. 31, 35, 42, 49, 50 and 54 be **DENIED as moot**.

4. That the Clerk of the Court **CLOSE** this case; AND

5. That the Clerk of the Court transmit a copy of his Memorandum Opinion and Order to all counsel and parties of record.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

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MEMORANDUM OPINION

Plaintiff Joan E. Jackson ("Plaintiff" or "Dr. Jackson"), acting *pro se*, brings this action against Defendant, Peter Geren, Acting Secretary, Department of the Army ("Defendant"), pursuant to Title VII of the Civil Rights Act of 1964,§ 701, *et seq[.]*, and 42 U.S.C.§ 2000e, *et seq.*, claiming retaliation for filing an Equal Employment Opportunity ("EEO") Complaint, participating in court hearings against the Secretary of the Army regarding discrimination and reporting perceived program mismanagement at Walter Reed Army Institute of Research to members of Congress ("WRAIR"). Currently pending before the Court is Defendant's motion for summary judgment (Paper No. 46), Plaintiff's cross motion for summary judgment or,

in the alternative for jury trial (Paper No. 55), and several discovery motions filed by Plaintiff (Paper Nos. 31, 35, 42, 49, 50 and 54). The Court has reviewed the entire record, as well as the pleadings and exhibits. The Court held a telephonic hearing on the Defendant's motion and Plaintiff's cross motion on November 7, 2008. For the reasons set forth below, the Court will grant Defendant's motion for summary judgment.

I. Factual and Procedural Background

A. Factual Background

The following facts are taken in the light most favorable to Plaintiff. Dr. Jackson was employed as a research scientist with the Department of the Army, based at the WRAIR. While under the employ of WRAIR, Dr. Jackson held the title of Research Zoologist, DV 0410-III (Paper No. 6 Ex. 1). Dr. Jackson worked as a civil research scientist, GS-13, in the Department of Parasitology, Division of Experimental Therapeutics ("DET"). In February 2001, Dr. Jackson filed an EEO complaint against WRAIR claiming discrimination based on her age, gender and a retaliation for a previous claim she had filed alleging sexual harassment. (Paper No. 6 Ex. 3) A two day hearing was held, during which Dr. Jackson was represented by counsel. As a result of the hearing, in November 2002, Dr. Jackson and WRAIR reached an initial settlement agreement. (Paper No. 55 Ex. 12) During this same time period, Dr. Jackson was placed on paid administrative leave. Under the agreement, WRAIR agreed to pay Dr. Jackson nine months worth of an unpaid salary in a lump sum and her

attorney's fees. In exchange, Dr. Jackson agreed to retire from the facility. (*Id.*) Subsequently, the settlement agreement was rejected by WRAIR.

Sometime before November 2002, Dr. Jackson wrote several letters to Senators Paul Sarbanes and Barbara Mikulski to inform them of an alleged "cover-up" and mismanagement of the Leishmaniasis program[1] at WRAIR. (Paper No. 55 Ex. 14) On April 10, 2002, Dr. Jackson was asked by her supervisor, Dr. Peter Weina, to "submit a written plan of action [by April 30, 2002 given the] impending dissolution of the WRAIR Leishmania Research Program at the end of Fiscal Year 2002. (Paper No. 46 Ex. 16) Dr. Weina reiterated his request to Dr. Jackson on April 25, 2002. (*Id.*)

On August 28, 2002, Dr. Weina notified WRAIR's Institutional Animal Care and Use Committee ("IACUC") of the concerns he had about Dr. Jackson modifying protocol COO2-00[2] without the required review and approval. (Paper No. 46 Ex. 10) The IACUC investigated Dr. Weina's concerns. The IACUC held a hearing and received testimony from Dr. Jackson, Dr. Weina and other WRAIR employees familiar with the protocol. (*Id.*) On November 14, 2002, the IACUC issued a final report. (*Id.*) The report contained both a majority and minority opinion. (*Id.*) Both the majority and

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[1] This program used canines to research and develop drugs to treat a complex, parasitic disease found in the Gulf War Region and Afghanistan, known as ["]leishmaniasis."

[2] The purpose of this protocol was to research a parasitic disease known as "leishmaniasis." Dogs, naturally infected with the disease, were the subjects of the study.

minority agreed that Dr. Jackson made "significant, multiple major modifications to the study design, without the benefit of an approved amendment addressing those modifications."[3] (*Id.*) The majority opinion recommended that: (1) the protocol be terminated; (2) all dogs in the study be euthanized; (3) Dr. Jackson write a final major amendment to terminate subject protocol; (4) Dr. Jackson be required to obtain animal care and use training through mandatory attendance of six IACUC meetings within the next year; and (5) no new protocols from Dr. Jackson be accepted for review or approval until the animal care and use training is completed. (*Id.*)

Dr. Jackson remained on paid administrative leave until April 2004.[4] When she returned to work, Dr. Jackson was temporarily assigned by Col. Donald Skillman to the Department of Entomology, Division of Communicable Diseases and Immunology. ("DCD&I") Dr. Jackson performed duties perhaps equivalent to those performed by a GS7-9, but her salary and title remained as it was before she was placed on administrative leave. (Paper No. 46 Ex. 14) Although the initial assignment was not to exceed 120 days, Dr. Jackson's assignment was extended three times, and ultimately lasted more than two years.

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[3] The minority opinion considered Dr. Jackson's lack of compliance with established policy to be a serious error in professional judgment rather than a willful effort to subvert animal use policy.

[4] Dr. Jackson's salary did not change while she was on paid administrative leave. Her salary was more than $110,000 per year. (Paper No. 46 Ex. 1 at 137:15-17, 170:5-9)

In June 2006, Dr. Jackson sought to present her "own" research on data from four dogs involved in the COO2–00 study. (Paper No. 55 Ex. 6) Dr. Debra Yourick informed Dr. Jackson that she could not present the data "since there was a complete restriction on publication." (*Id.*) Dr. Jackson retired from WRAIR in September 2006. (Paper No. 46).

B. Procedural Background

Dr. Jackson filed an EEO complaint against WRAIR on February 21, 2001. When settlement negotiations failed in that case, Dr. Jackson reinstituted her complaint with the EEOC. Jackson later withdrew that claim with the EEOC and filed a discrimination claim based on age and gender, among other things, in federal court. Jackson's claim was dismissed by Judge Titus, and on appeal, the Fourth Circuit upheld the dismissal.

Jackson then filed another complaint with the EEOC. She also withdrew that claim with the EEOC and filed a complaint in this Court on April 3, 2007 for retaliation and injurious falsehoods during her employment as a Research Scientist with WRAIR. Jackson initially alleged that WRAIR discriminated against her by: (1) limiting her ability to publish her research and conduct further research; (2) demoting her to an inferior lab position and writing performance evaluations that were negative and inaccurate; and (3) defaming her to a prospective employer at Cornell University.

On August 3, 2007, Defendant filed a motion to dismiss or in the alternative a motion for summary judgment. On March 25, 2008, after brief-

ing by the parties, the Court granted Defendant's motion in part and denied it in part. The Court found that Dr. Jackson's claim for retaliation based on negative performance evaluations and delays in publishing failed and granted summary judgment to Defendant. The Court also granted summary judgment with respect to Dr. Jackson's claim for defamation. The Court, however, denied Defendant's motion for summary judgment regarding Dr. Jackson's claims for retaliation based on a "complete restriction" on her publication rights and her reassignment or demotion when she returned to WRAIR after being placed on paid administrative leave for sixteen months. After extensive discovery, Defendant renewed its motion for summary judgment. The Court held a telephonic hearing to allow the parties to argue their positions.

II. Standard of Review

Summary judgment is proper if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 302 (4th Cir. 2006). A material fact is one that "might affect the outcome of the suit under the governing law." *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986)). The "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact. *Anderson*, 477 U.S. at 247-48 (emphasis in original). However, the nonmoving party "cannot

create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1986). The Court may only rely on facts supported in the record, not simply assertions in the pleadings, in order to fulfill its "affirmative obligation . . . to prevent 'factually unsupported claims or defenses' from proceeding to trial." *Felty v. Grave-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Celotex*, 477 U.S. at 323-24). When ruling on a motion for summary judgment, "[t]he evidence of the nonmovant is to be believed, and all *justifiable* inferences are to be drawn in his favor." *Anderson*, 477 U.S. at 255 (emphasis added).

III. Analysis

Rarely is a plaintiff able to establish intentional discrimination or retaliation by direct evidence. Absent direct evidence of retaliation, a plaintiff must first demonstrate by a preponderance of the evidence, a prima facie case of retaliation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Once the plaintiff establishes a prima facie case of discrimination, the defendant has the burden of producing evidence that the adverse employment action was taken for a legitimate, nondiscriminatory reason. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507 (1993). Thereafter, the plaintiff may adduce evidence showing that the defendant's proffered reason was a mere pretext and that race was the real reason for the defendant's less favorable treatment of the plaintiff. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 284 (4th Cir. 2004). Although the evidentiary burden shifts back and

forth under the *McDonnell Douglas* framework, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all time with the plaintiff." *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

A. Retaliation Based on Restriction on Publication

To establish a prima facie case, Dr. Jackson must demonstrate that: (1) she engaged in a protected activity; (2)WRAIR took adverse employment actions against her; and (3) a causal connection existed between her protected activity and WRAIR's adverse actions. *See* 42 U.S.C. § 2000e, *et seq[.]* ("Title VII"). Dr. Jackson's main claim concerns the extensive research she performed for the Leishmaniasis program while employed by WRAIR. Dr. Jackson contends that WRAIR retaliated against her by permanently excluding her from publishing or disclosing her dog protocol research and "administratively reassigning her work to another scientist" because she engaged in a variety of protected activities between 2000 and 2004. (Paper No. 55) Although Dr. Jackson alleges six protected activities, her pleadings and exhibits primarily address two activities: (1) the EEO claims Dr. Jackson filed; and (2) Dr. Jackson's communication with Senators Sarbanes and Mikulski concerning alleged mismanagement of the Leishmaniasis Program. As these activities certainly constitute protected activities, Dr. Jackson has established the first prong of her prima facie case of retaliation.

Dr. Jackson states that the actions taken by WRAIR were adverse because "nothing is more harmful to a research scientist's career" than prohibiting her from publishing and thus receiving credit for work conducted over a 15 year period. (Paper No. 60). While the facts surrounding the COO2-00 protocol and Dr. Jackson's right to publish her research related to the protocol are clouded by Dr. Jackson's emotion, the Court agrees, in principal, that such actions would arguably be considered "adverse," and therefore finds that Dr. Jackson has tenuously established the second element of her prima facie case.

To establish a causal connection between a protected activity and the adverse action, "the temporal proximity must be 'very close.'" *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273-74 (2001). Stated another way, Dr. Jackson must demonstrate that WRAIR took the adverse employment action against her *because* she engaged in a protected activity. Dr. Jackson offers a scant amount of evidence that supports any causal connection between her protected activity and WRAIR's adverse action. In her pleadings, Dr. Jackson devotes the majority of her time and energy addressing her contention that another, less qualified research scientist, who never conducted or participated in the research, appropriated her work. During discovery, Dr. Jackson deposed this scientist, Brianna Skinner-Harris, at length. (Paper No. 55 Ex. 1) Question after question, Dr. Jackson tried to elicit testimony from Dr. Skinner-Harris to support her assertion that her superiors at WRAIR appropriated her work in an effort to claim it as their own. To Dr. Jackson, it is clear

that the restrictions on publication of the COO2-00 protocol and all of the related issues were caused by and due to her protected activities. But it is not clear to the Court. There is virtually no evidence to support a causal connection.

In fact, the uncontroverted evidence indicates that the restrictions were a result of Dr. Jackson's protocol violations as indicated in the November 14, 2002 IACUC report. In 2002, the IACUC found that Dr. Jackson made "significant, multiple major modifications to the study design, without the benefit of an approved amendment addressing those modifications." (Paper No. 46 Ex. 10) Among other things, the committee found that "whatever data had been generated [from the study], had been obtained outside the bounds of an IACUC-approved protocol," (Paper No. 46 Ex. 10 p. 8) and recommended that Dr. Jackson be required to obtain animal care and use training through mandatory attendance of six IACUC meetings within the next year; and that no new protocols from Dr. Jackson be accepted for review or approval until the animal care and use training is completed. (*Id.*) In 2006, Dr. Jackson wished to give a presentation at a symposium on her "own" research on four dogs in the COO2-00 protocol and inquired whether she could do so. (Paper No. 55 Ex. 6) Dr. Debra Yourick informed her that it was not possible since there was a "complete restriction on publication." (*Id.*) Since WRAIR found in 2002 that the COO2-00 data was obtained outside an IACUC-approved protocol, WRAIR sought only to restrict Dr. Jackson's publication rights with respect to the COO2-00 protocol. Moreover, Dr. Jackson admitted as much in her deposition. (Paper No. 46 Ex. 1 at 235:14-15)

She stated that the restriction "only has to do with the dog protocol" and acknowledged that the IACUC found that she violated the protocol. (*Id.*) Yet, in her pleadings, Dr. Jackson attempts to gloss over this fact and instead asserts that protocol violation was a way for WRAIR to lay claim to Dr. Jackson's work.

Dr. Jackson's numerous and emotionally charged allegations of impropriety related to the termination of the COO2-00 protocol and alleged "taking" of her research fail to demonstrate to the Court any causal connection between Dr. Jackson's protected activities and the restrictions placed on publication of the COO2-00 protocol. It is also worth noting that in 2004, after Dr. Jackson's engaged in protected activities, Dr. Jackson submitted and her supervisors approved four different documents, unrelated to the COO2-00 protocol, for publication. (Paper No. 46 Ex. 1 and 3) This undisputed fact further undermines Dr. Jackson's assertion. Thus, the Court finds Dr. Jackson has failed to establish the third element her prima facie case. However, even were the Court to somehow find a causal connection between Dr. Jackson's protected activity and the adverse action taken against her, Defendant has certainly established a legitimate non-discriminatory reason for restricting Dr. Jackson's opportunity to publish any data in connection with the COO2-00 protocol. Thus, the Court will grant Defendant's motion for summary judgment with respect to this portion of Dr. Jackson's claim for retaliation.

B. Retaliation Based on Dr. Jackson's Reassignment/Demotion

In April 2004, Dr. Jackson returned to work at WRAIR after being on paid administrative leave since November 2002. Upon her return, Dr. Jackson was temporarily assigned by Col. Donald Skillman to the DCD&I. Dr. Jackson performed duties perhaps equivalent to those performed by a GS7-9, but her salary and title remained as it was before she was placed on administrative leave. (Paper No. 46 Ex. 14) Although the initial assignment was not to exceed 120 days, Dr. Jackson's assignment was extended three times, and ultimately lasted more than two years. While Dr. Jackson contends that this was a "demotion" in retaliation for her protected activities, Defendant maintains that the change was a "detail assignment." Defendant submits that a "detail assignment is not automatically actionable,["] but rather "should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Burlington N. & Santa Fe Ry. Co. v.White*, 548 U.S. 53, 71 (2006).

Considering all the circumstances, the Court does not find that the Dr. Jackson was "demoted" upon her return to WRAIR in 2004. Her title and salary remained as it was before she went on leave, and the funding for the leishmaniasis research ended at the end of Fiscal Year 2002. The record supports that as early as April 2002, Dr. Jackson was aware that the funding for the leishmaniasis research would not continue. (Paper No. 46 Ex. 16 and 17) Yet, Dr. Jackson implores the Court to find that the lack of funding was a

pretext for discrimination. (Paper No. 55) Defendant also argues and the record supports that Col. Skillman, the person who assigned Dr. Jackson to the temporary detail, had little or no knowledge about Dr. Jackson's protected activities, (Paper No. 6 Ex. 1) and in her deposition, Dr. Jackson admitted that she "had very little [or virtually no] interaction with Col. Skillman." (Paper No. 46 Ex. 1) Dr. Jackson clearly was insulted by the detail and considered the work beneath a scientist of her background and experience, but that is not enough to support her burden. The detail assignment was neither materially adverse nor was there any causal connection between Dr. Jackson's protected activities and the detail assignment made by Col. Skillman. Thus, the Court will grant Defendant's motion for summary judgment with respect to this portion of Dr. Jackson's claim for retaliation as well.

IV. Conclusion

For all the foregoing reasons, the Court will GRANT Defendants' Motion for Summary Judgment and DENY Plaintiff's Cross-Motion for Summary Judgment. An Order consistent with this Opinion will follow.

November 14, 2008
Date

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND SOUTHERN DIVISION

JOAN E. JACKSON,	)	
Plaintiff,	)	
v.	)	Civil Action
	)	No. AW-07-851
THE HONORABLE	)	
PETER GEREN,	)	
Acting Secretary,	)	
Dept. of the Army,	)	
Defendant.	)	

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ORDER

Pro se Plaintiff Joan E. Jackson has four motions currently pending before this Court: (1) Motion (Request) for an Injunction (Doc. No. 17); (2) Motion for Reconsideration (Doc. No. 18); (3) Motion to Reconsideration (Doc. No. 20); and (4) Motion (Request) for Witness Subpoenas (Doc. No. 23). The Court will briefly address each motion below.

With respect to Plaintiff's request for a permanent injunction, the Court does not believe that Plaintiff has presented sufficient grounds for such relief. Plaintiff seeks an injunction to preclude "possible" further retaliatory harm; however, the only noted example of prior "irreparable retaliatory harm" was an alleged phone call made in October 2002, over five and a half years ago, to Professor Steve Barr, DVM, Ph.D., at Cornell University Col-

lege of Veterinary Medicine, in which Plaintiff's former supervisor threatened to file animal protocol violations against Dr. Barr if he were to collaborate with Plaintiff. While Plaintiff notes that there are "many" examples or such retaliatory harm, Plaintiff has failed to provide the Court with those "many" examples or even state other incidents of alleged irreparable harm to her reputation. Thus, Plaintiff's reference to an incident that occurred well over five years ago, without more, is1 not sufficient to support the issuance of a permanent injunction. Therefore, the Court, at this time, will deny such request.

The Court will also deny Plaintiff's motions for reconsideration. A court may grant a motion for reconsideration under Fed. R. Civ. P. Rule 60(b) in limited circumstances where equity requires reconsideration. *See generally* 11 Wright, Miller & Kane, Federal Practice and Procedure § 2857 (2d ed. 1995). Because Rule 60 is an extraordinary remedy, "a motion to reconsider is not a license to reargue the merits or present new evidence." *Royal Ins. Co. of Am. v. Miles & Stockbridge*, P.C., 142 F. Supp. 2d 676, 677-78 n.1 (D. Md. 2001). As a result, reconsideration is warranted only because of: (1) a change in controlling law; (2) the availability of new evidence; or (3) the need to correct a clear error or prevent manifest injustice." *Bogart v. Chapell*, 396 F.3d 548, 555 (4th Cir. 2005); *Potter v. Potter*, 199 F.R.D. 550, 552 (D. Md. 2001) (internal citations omitted). Plaintiff does not direct the Court's attention to any intervening changes in the controlling law and does not present any new evidence that was previously unavailable. Upon thorough consideration of the pending Motion for Reconsideration,

and the authority offered in support of it, the Court does not believe that its ruling was in error or that Plaintiff has presented any new information, either factual or legal, which warrants a modification of the ruling.

Additionally, the Court will deny Plaintiff's request for witness subpoenas. Considering that this litigation is still in the discovery stage, and that the deadline for the parties to file dispositive motions had not yet approached, the Court believes that Plaintiff's request is too premature. Therefore, the court will deny the request for witness subpoenas, without prejudice, reserving the right for Plaintiff to re-file this motion when timely associated with her need for witness subpoenas. Accordingly, IT IS this **20th day of May, 2008**, by the United States District Court for the District of Maryland, hereby **ORDERED**:

1. That Plaintiff's Motion (Request) for an Injunction (Doc. No. 17) BE, and the same hereby IS, **DENIED**;

2. That Plaintiff's Motion to Reconsider (Doc. No. 18) BE, and the same hereby IS, **DENIED**;

3. That Plaintiff's Motion to Reconsider (Doc. No. 20) BE, and the same hereby IS, **DENIED**;

4. That Plaintiff's Motion (Request) for Witness Subpoenas (Doc. No. 23) BE, and the same hereby IS, **DENIED**; AND

5. That the Clerk of the Court transmit a copy of this Order to all counsel and parties of record and mail a copy to pro se Plaintiff.

/s/ Alexander Williams, Jr.
Alexander Williams, Jr.
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
CASE NO. 09-1081

In re:	) Notice of Intent to File a
JOAN E. JACKSON	) Petition for a Writ of
Petitioner	) Certiorari to the United
v.	) States Supreme Court
THE HONORABLE	) re Petition Denied for
PETER GEREN,	) Rehearing and Rehear-
SECRETARY,	) ing En Banc of Fourth
DEPT. OF THE ARMY	) Circuit Appeal No.
Respondent	) 09-1081 of Order from
v.	) Civil Action No.
BRIANNA	) AW-07-00851 in the
SKINNER-HARRIS	) District Court of the
Respondent [Movant]	) United States The
	) District of Maryland
	) Southern Division
	)

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Notice of Intent to File a Petition for a Writ of Certiorari to the United States Supreme Court and Petition for Stay of the Mandate of the Fourth Circuit Court of Appeals Pending Final Determination

1. To Respondents in re the case above, to include The Honorable Peter Geren, Secretary of the Army, and Brianna Skinner-Harris: You will please take notice of Petitioner's intent to file a petition that a writ of certiorari issue for the United States Supreme Court to review the judgment of the United States Court of Appeals for the Fourth Circuit to deny rehearing and deny rehearing *en banc* of order from civil action No. AW-07-00851 in the District Court of the United States District of Maryland Southern Division, entered in the above case on July 21, 2009. 28 U.S.C.A. § 1254(1); 28 U.S.C.A. § 1651. A copy of said notice is served by certified mail signature indicating receipt requested.

2. Petitioner also, hereby, respectfully petitions for a stay of the mandate of the Fourth Circuit Court of Appeals pending their final determination, and for such other and further relief as may be just and proper. Federal Rules of Appellate Procedure 41(d)(2).

Respectfully submitted this 30th day of July 2009,

/s/ Joan E. Jackson
Joan E. Jackson, Petitioner Pro Se
P.O. Box 1505
Onset, Massachusetts 02558-1505
Email: jacksonall@aol.com
Cell Phone: 301-661-9002

CERTIFICATE OF SERVICE

Joan E. Jackson, PhD, *Pro Se* Petitioner, does hereby certify that Respondents have been served a complete and accurate copy of "Notice of Intent to File a Petition for a Writ of Certiorari to the United States Supreme Court and Petition for Stay of the Mandate of the Fourth Circuit Court of Appeals Pending Final Determination," by placing a certified mail –"Restricted Delivery" with signature return receipt in the United States mail, sufficient first class postage affixed and addressed as follows:

Clerk of the Court, Attn: Ms. Pamela Stump
United States Court of Appeals, Fourth Circuit
U.S. Courthouse Annex, Fifth Floor
1100 East Main Street
Richmond, Virginia 23219
PH: 804-916-2700

And

Mr. Alex S. Gordon, Esq.
[NTC Government]
Office of the United States Attorney
36 South Charles Street, Fourth Floor
Baltimore, Maryland 21201
Fax No.:410-962-9947
PH: 410-209-4800

And

Ms. Nefertara Clark, Esq.
[NTC Dr. Skinner-Harris, DVM]
8 North Oliver Street
Elberton, Georgia 30635
PH: 706-283-9732

Dated this 30th day of July 2009.

/s/ Joan E. Jackson
Dr. Joan E. Jackson, PhD,
Pro Se Petitioner
P.O. Box 1505
Onset, Massachusetts 02558-1505
Cell Phone: 301-661-9002
Email: jacksonall@aol.com

AFFIDAVIT FOR NOTICE OF INTENTION TO APPLY FOR WRIT OF CERTIORARI

Joan E. Jackson, petitioner *pro se*, under penalty of perjury states:

1. She is the *pro se* plaintiff and appellant in the above-numbered and entitled cause, and petitioner in this notice of intent to petition for a writ of certiorari.

2. Petitioner, *pro se*, in accordance with the rules of this Honorable Court and the laws of this state, hereby gives notice of her intention to petition the United States Supreme Court for a writ of certiorari in this case, such being addressed to the Respondents, by their attorneys of record for the Honorable Peter Geren, Secretary of the Army, original defendant/respondent, and Brianna Skinner-Harris, movant/respondent, respectively; and also herewith respectfully petitions for stay of The Fourth Circuit Court of Appeals' mandate in the above case pending outcome of these petitions.

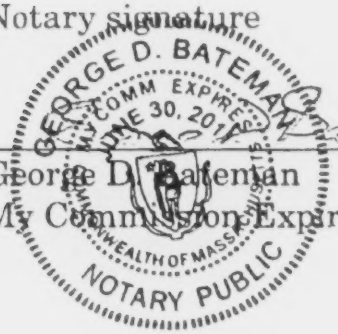
3. Affiant further declares under penalty of perjury that all averments made in this affidavit and in the above notice of intent to file said petitions are to my best knowledge true and correct.

Dated: 30 July 2009.

/s/ Joan E. Jackson
Joan E. Jackson, Petitioner *pro se*
P.O. Box 1505
Onset, Massachusetts 02558-1505
Email: jacksonall@aol.com
Cell phone: 301-661-9002

Signed before me this day twenty-fourth day of December 2009

Notary signature



George D. Bateman
My Commission Expires: June 30, 2011

- **42 C.F.R. §§ 50 and 93 (May 17, 2005)**

[NOTE: The pertinent section of this regulation was reproduced in the text body of the petition so is not given again here.]

- **Department of Defense Directive, No. 32162 (2003).**

§4.8 Research Misconduct.

All DoD Components shall establish procedures to monitor and review the ethical conduct of research. The DoD Components that conduct or support research shall ensure that data and data collection are conducted in an ethical manner. In cases in which data are not collected in an appropriate manner, the DoD Component shall determine if the misconduct was intentional or reckless; was an isolated event or part of a pattern; had significant impact on the research record; or had significant impact on other researchers or institutions. The DoD Component shall initiate and carry through on any actions that are necessary to ensure resolution of misconduct findings. All findings of serious research misconduct under this section shall be reported to the Director, Defense Research and Engineering.